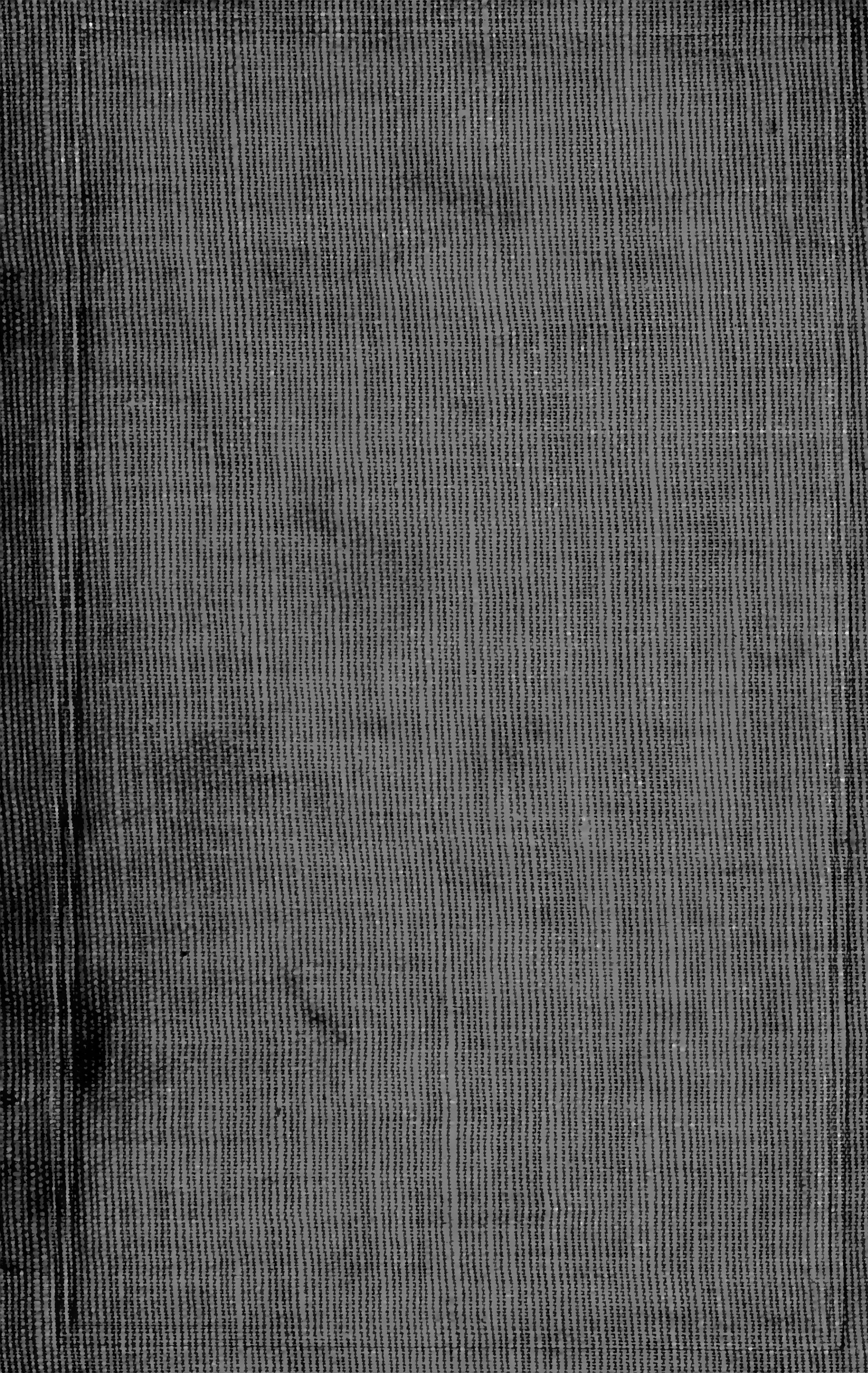

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No. 1665

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

GEORGE E. LITTELL,

Plaintiff in Error,

vs.

THE UNITED STATES,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

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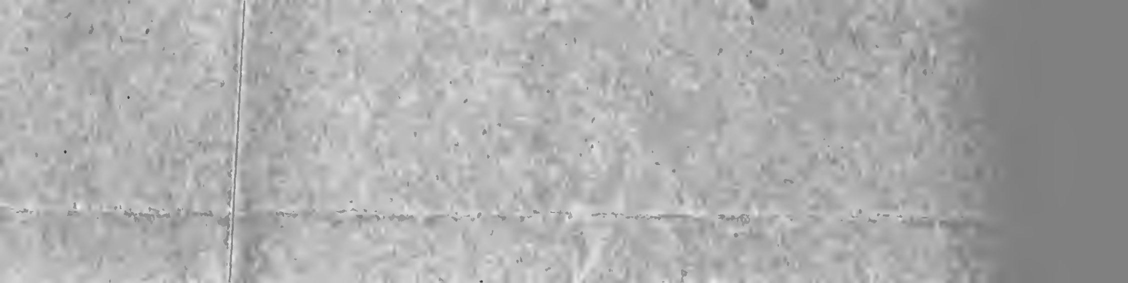

No. 1665

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FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3709.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE E. LITTELL,
Defendant.

[Names and Addresses of] Counsel.

ELMER E. TODD, Esquire, United States District Attorney, and CHARLES T. HUTSON, Esquire, Assistant U. S. District Attorney, Lowman Building, Seattle, Washington.

FRANK H. HOLZHEIMER, Esquire, and W. A. HOLZHEIMER, Esquire, 537 Burke Building Seattle, Washington, Attorneys for Appellant.

In the United States District Court for the Western District of Washington, Northern Division.

No. ——

May Term, A. D. 1908.

The United States of America,
Western District of Washington,—ss.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE E. LITTELL,
Defendant.

Indictment.

The grand jurors of the United States of America, duly empaneled, sworn and charged to inquire within and for the Western District of Washington, upon their oaths, present:

That heretofore, to wit: Between the 11th day of May, A. D. 1907, and the 17th day of June, A. D. 1907, one George E. Littell, late of the Northern Division of the Western District of Washington, did, at the city of Seattle, in the county of King, State of Washington, within said district and division aforesaid, and within the jurisdiction of this court, then and there being, then and there unlawfully, knowingly and feloniously, and with intent to defraud one Josephine C. Dabney, and divers and sundry other persons to the grand jurors unknown, falsely assume and pretend to be an officer and employee acting under authority of the United States, and of the Treasury Department thereof, to wit: As an officer of the United States Secret Service, and in such pretended character as such officer and employee as aforesaid, did unlawfully, knowingly and feloniously demand and obtain from said Josephine C. Dabney a thing of value, to wit: Board and lodging at the house of said Josephine C. Dabney, to the amount and of the value of thirty dollars; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

SECOND COUNT.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to wit: On or about the 25th day of May, A. D. 1907, one George E. Littell, late of the Northern Division of the Western District of Washington, did, at the city of Seattle, in the county of King, in the State of Washington, within said division and district aforesaid, and within the jurisdiction of this court, then and there being, then and there unlawfully, knowingly and feloniously, and with intent to defraud one Josephine C. Dabney, and divers and sundry other persons to the grand jurors unknown, falsely assume and pretend to be an officer and employee acting under authority of the United States, and of the Treasury Department thereof, to wit: As an officer of the United States Secret Service, and in such pretended character, as such officer and employee as aforesaid, did unlawfully, knowingly and feloniously demand and obtain from said Josephine C. Dabney, a thing of value, to wit: Two dollars of the lawful money of the United States of America, of the value of two dollars; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

THIRD COUNT.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to wit: On or about the first day of June, A. D. 1907, one George E. Littell, late of the Northern Division of the Western District of

Washington, did, at the city of Seattle, in the county of King, in the State of Washington, within said division and district aforesaid, and within the jurisdiction of this court, then and there being, then and there unlawfully, knowingly and feloniously, and with intent to defraud one Josephine C. Dabney, and divers and sundry other persons to the grand jurors unknown, falsely assume and pretend to be an officer and employee acting under authority of the United States, and of the Treasury Department thereof, to wit: As an officer of the United States Secret Service, and in such pretended character, as such officer and employee as aforesaid, did unlawfully, knowingly and feloniously demand and obtain from said Josephine C. Dabney, a thing of value, to wit: Five dollars of the lawful money of the United States of America, of the value of five dollars; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

FOURTH COUNT.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That therefore, to wit: On or about the 12th day of June, A. D. 1907, one George E. Littell, late of the Northern Division of the Western District of Washington, did, at the city of Seattle, in the county of King, in the State of Washington, within said district and division aforesaid, and within the jurisdiction of this court, then and there being, then and there unlawfully, knowingly and feloniously, and with intent to defraud one Josephine C. Dabney, and divers and

sundry other persons to the grand jurors unknown, falsely assume and pretend to be an officer and employee acting under authority of the United States, and of the Treasury Department thereof, to wit: As an officer of the United States Secret Service, and in such pretended character, as such officer and employee as aforesaid, did unlawfully, knowingly and feloniously demand and obtain from said Josephine C. Dabney a thing of value, to wit: Six hundred dollars of the lawful money of the United States of America, of the value of six hundred dollars; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

FIFTH COUNT.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to wit: Between the 12th day of May and the 17th day of June, A. D. 1907, one George E. Littell, late of the Northern Division of the Western District of Washington, did, at the city of Seattle, in the county of King in the State of Washington, within said district and division aforesaid, and within the jurisdiction of this court, then and there being, then and there unlawfully, and knowingly and feloniously, and with intent to defraud various persons to the grand jurors unknown, falsely assume and pretend to be an officer and employee acting under authority of the United States, and of the Treasury Department thereof, to wit: As an officer of the United States Secret Service, and did thereupon take upon himself to act as such; contrary to the form of

the statute in such case made and provided, and against the peace and dignity of the United States of America.

ELMER E. TODD,
United States Attorney.
CHARLES T. HUTSON,
Assistant United States Attorney.

Witnesses examined before grand jury:
JOSEPHINE C. DABNEY.
C. B. CRAWFORD.
JAMES HILTON.

[Endorsed]: Indictment for Vio. Act April 1884—Impersonating U. S. Officer. A True Bill. Ben. W. Barnes, Foreman Grand Jury. Presented to the Court by the Foreman of the Grand Jury in open Court in the presence of the Grand Jury, and filed in the U. S. District Court, June 3, 1908. R. M. Hopkins, Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3709.

June 3, 1908.

UNITED STATES OF AMERICA
vs.
GEORGE E. LITTELL.

Arraignment and Plea.

Now, on this day into open court comes the said defendant George E. Littell for arraignment, and

being asked if the name by which he is indicted is his true name, replies: "It is." Whereupon, the indictment is read to him and he here and now enters his plea of not guilty to the charge in the indictment herein against him.

Bail of the defendant is fixed at $3,000.00, and the U. S. Marshal is directed to give the defendant an opportunity to arrange for bail.

Entered in Vol. 1, page 319 of Journal, United States District Court.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3709.

UNITED STATES OF AMERICA,

vs.

GEORGE E. LITTELL.

Verdict.

We, the jury in the above-entitled cause, find defendant guilty as charged in the indictment.

S. M. ALLEN,
Foreman.

[Endorsed]: Verdict. Filed in the U. S. District Court, Western District of Washington. July 21, 1908. 12 P. M. R. M. Hopkins, Clerk. W. D. Covington, Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 3709.

The United States of America,
Western District of Washington,—ss.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE E. LITTELL,

Defendant.

Motion in Arrest of Judgment.

And now comes the defendant, and moves the Court to arrest judgment on each and every count in the indictment herein upon which the defendant was convicted, because the facts therein stated do not constitute an offense against the laws and statutes of the United States.

HOLZHEIMER & HOLZHEIMER,
Attorneys for Defendant, 537 Burke Bldg., Seattle, Wash.

State of Washington,
County of King,—ss.

F. H. Holzheimer, being first duly sworn, deposes and says: That he is one of the attorneys for the above-named defendant, and that he has read the foregoing motion and notes the contents thereof, and believes the same meritorious and well founded in law.

F. H. HOLZHEIMER.

Subscribed and sworn to before me this 23d day of July, 1908.

[Seal] ELIAS A. WRIGHT,

Notary Public in and for the State of Washington,
Residing at Seattle.

Received a copy of the above motion in arrest of judgment this 23d day of July, 1908.

CHARLES T. HUTSON,
Ass't. U. S. Attorney.

[Endorsed]: Motion in Arrest of Judgment. Filed in the U. S. District Court, Western District of Washington. July 24, 1908. R. M. Hopkins, Clerk. W. D. Covington, Deputy.

[Order Denying Motion in Arrest of Judgment.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3709.

August 8, 1908.

UNITED STATES OF AMERICA

vs.

GEO. E. LITTELL.

Now, on this day this cause comes on to be heard upon defendant's motion in arrest of judgment; the Court after hearing argument of respective counsel and being sufficiently advised in the premises, denies said motion.

Entered in Vol. 1, page 490 of General Order Book, U. S. District Court.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3709.

August 10, 1908.

UNITED STATES OF AMERICA,

vs.

GEORGE E. LITTELL.

Sentence.

Comes now this 10th day of August, 1908, the said defendant, George E. Littell, into open court for sentence, and being informed by the Court of the indictment herein against him of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, he nothing says save as he before hath said.

Wherefore, by reason of the law and the premises, it is considered by the Court that the said defend-George E. Littell, be punished by being imprisoned in the United States Penitentiary at McNeil's Island, Pierce County, Washington, or in any other place as may be hereafter provided for the imprisonment of offenders against the laws of the United States for the term of two years from and after this date; and that he pay a fine of One Thousand Dollars ($1,000), and the costs of this prosecution to be taxed and that execution issue therefor, and that he

be further imprisoned in the United States Penitentiary until such fine and costs are paid or until he shall be otherwise discharged by due process of law.

And the said defendant, George E. Littell, is now hereby ordered into custody of the United States Marshal, to carry this sentence into execution.

Entered in Vol. 1, page 93, of Judgments and Decrees of U. S. District Court.

In the United States District Court for the Western District of Washington, Northern Division.

No. 3709.

The United States of America,
Western District of Washington,—ss.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE E. LITTELL,

Defendant.

Motion for a New Trial.

Comes now the defendant in the above-entitled cause by his attorneys, Holzheimer & Holzheimer, and moves the Court to set aside the verdict of the jury in said action and grant a new trial thereof for the following reasons:

1.

For refusing to grant defendant's motion to dismiss said action at the close of the testimony on the part of the United States.

2.

Insufficiency of the evidence to sustain either of the counts stated in the indictment.

3.

Insufficiency of the evidence to sustain the verdict.

4.

Errors of law occurring at the trial of said action, to which errors the defendant excepted at the time, a complete record of said errors, with the exceptions thereto, have been preserved in the stenographer's notes of the trial, to which the defendant hereby refers for a complete statement and enumeration thereof.

HOLZHEIMER & HOLZHEIMER,
Attorneys for Defendant,
537 Burke Bldg., Seattle, Wash.

State of Washington,
County of King,—ss.

F. H. Holzheimer, being first duly sworn, deposes and says: That he is one of the attorneys for the above-named defendant, and that he has read the foregoing motion for a new trial, notes the contents thereof, and believes the same meritorious and well founded in law.

F. H. HOLZHEIMER.

Subscribed and sworn to before me this 23d day of July, 1908.

[Seal] ELIAS A. WRIGHT,
Notary Public in and for the State of Washington, Residing at Seattle.

Received a copy of the above motion for a new trial this 23d day of July, 1908.

CHARLES T. HUTSON,
Asst. U. S. Attorney.

[Endorsed]: Motion for a New Trial. Filed in the U. S. District Court, Western District of Washington. July 24, 1908. R. M. Hopkins, Clerk. W D. Covington, Deputy.

[Order Denying Motion for a New Trial.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3709.

August 8, 1908.

UNITED STATES OF AMERICA,

vs.

GEO. E. LITTELL.

Now, on this day this cause comes on to be heard upon defendant's motion for a new trial; the court after hearing argument of respective counsel and being sufficiently advised in the premises, denies said motion.

Entered in Vol. 1, page 490, of General Order Book, U. S. District Court.

In the United States District Court for the Western District of Washington.

No. 3709.

THE UNITED STATES,

vs.

GEORGE E. LITTELL.

Defendant's Bill of Exceptions.

APPEARANCES:

For the United States, Assistant District Attorney HUTSON,

For the Defendant, HOLZHEIMER & HOLZHEIMER.

Statement of Facts.

Be it remembered, that on the 3d day of June, 1908, the said defendant was arraigned in open court, the indictment, No. 3709, being read to him; and that thereupon the said defendant entered a plea of not guilty. That on the 17th day of July, 1908, the said cause came on regular for trial before the Hon. C. H. Hanford, Judge of the above-named court, and before a jury, duly and regularly empanceled and sworn to try the issues herein presented, the following proceedings were had and testimony given, to wit:

Mr. Hutson read the statute to the jury upon which the indictment is founded, also read portions of the indictment to the jury.

Mr. Holzheimer requested the Court to enforce the rule excluding the witness for the prosecution

and for the defense and that they be called as they are required.

The Court granted the request and the witnesses accordingly retired.

Mr. Hutson made an opening statement on behalf of the Government to the jury, followed by Mr. Holzheimer, who made a statement to the jury on behalf of the defendant.

[Testimony of Josephine C. Dabney.]

JOSEPHINE C. DABNEY called and produced as a witness on behalf of the United States, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. HUTSON.)

Q. Just state your full name.

A. Josephine C. Dabney.

Q. Where do you reside?

A. I reside in Los Angeles now.

Q. At this time? A. Yes.

Q. Where were you residing during the month of May and June, 1907? A. In Seattle.

Q. Where? A. 614 University Street.

Q. What were you doing at that time?

A. I had a rooming-house there of eleven rooms.

Q. How many were there in your family?

A. I had two daughters.

Q. Of what ages?

A. Sixteen and seventeen.

Q. Were you doing this to support yourself?

A. I certainly was; I had no other way of getting along.

(Testimony of Josephine C. Dabney.)

Q. You were caring for your daughters?

A. I was.

Q. Did you ever see the defendant?

A. I have.

Q. When and where and under what circumstances did you first meet him?

A. There was a personal in the paper and he came in answer to it and he introduced himself as Captain George E. Littell, of Mexico. As to his references he said his references were beyond question, as he was employed by the United States Secret Service as an official and he was here in regard to paying off men and hastening the work on the Federal Building and other works that came under the Government; that he was employed in that line.

Q. What did he do; did you invite him in at that time?

A. I did, and he came in and stayed about twenty minutes or it might have been half an hour.

Q. What did you do? What did you talk about?

A. Telling about his being up from Mexico that he had come up here to pay off these men. He introduced himself as Captain George E. Littell and said his references was, that he was in the employ of the United States Secret Service, that he was in the Federal Building and was paying off the men.

Q. You say you invited him in?

A. I did, I invited him to come in. He said he was up here from Mexico and that he had sent in his resignation. He said really that he ought not to be doing the work that he did, that it was too hard

(Testimony of Josephine C. Dabney.)

for him and he sent in his resignation. We got to talking about one thing and another and he wanted to know if I owned that place. I said I did. He wanted to look at the rooms. I had two vacant ones that day that he went through; he wanted to know if he could look at them. I said he could. I had a front room and he looked at that. I said I didn't think that the rooms would suit him. I said, they are not modern in every respect, that there was no running water there, but he might look at the rooms. He looked at them and he said, "They are all right," he said, "I don't care what the room is so that it is clean and homelike." He said, "In my work I have to have it quiet, not only for that, but for my health." He said, "I can't stand the social functions they have at the hotel." He told me that he came from the Hotel Lincoln.

Q. You showed him the rooms?

A. Yes, I showed him the rooms and I told him the price for that front room was $5 and I said the other room was $4.50 with two men in it but for one I would rent that cheaper. He didn't say whether he would take the rooms that day or not; he said it was liberal, and went away, and he called again in a day or two, I wouldn't say just when, whether the next day or not; at any rate, he called again.

Q. You say he came back within a day or so.

A. Yes, he came back within a day or so, and looked at the rooms and I believe he says, "I will take this room. It is just the place I want to get into, a homelike, quiet place; I don't like to be mingling with

(Testimony of Josephine C. Dabney.)

the public," he says. "I am supposed to be by myself, where," he said, "I can do better work, working for the United States Secret Service." I said, "I can't let you have the room now because I have that rented. I rented one to a doctor and his wife and rented the side room to Mr. and Mrs. Crawford. I said, "They don't come in until Monday but they made a deposit on it, and they may not come at all." He said, "I'll tell you, what's the matter with my taking this room any way over Sunday—that would be Saturday night and Sunday"—he said, "Perhaps I can get a room in the neighborhood somewhere if you don't have it." He took the room and came there Saturday night and Sunday we were talking in a little room—an offset, a kind of a little room I had fitted up there; there was a little side room used for a bedroom; it was not very good for that because it was most too public. I used it for a small sitting-room; it was mostly a hall that was right out of the main hall. He took the room for those two nights and Mr. and Mrs. Crawford came and moved in on Monday. On Monday he said, "What is the matter with my taking this room in here?" That was that little room he had used for a sitting-room. I said, "It don't seem to me that it is suitable."

Q. Did he take that room then?

A. Yes, he took that room then. I said, "It don't seem to me," I says, "that it would answer for you if you want to be quiet." He said, "I am willing to get along with it for a few days."

(Testimony of Josephine C. Dabney.)

Mr. HOLZHEIMER.—I object to this long, rambling statement.

The COURT.—I don't think it is a rambling statement. She is detailing the conversation; that is the very thing that she will have to do, his representations. Go ahead.

The WITNESS.—(Resuming.) He took the room then, and of course when it came Sunday he got to speaking about board. He said, "I would like to get a place where I could have home cooking," and he fairly insisted upon having a Sunday dinner there. He even said that he would go out and get some groceries if I would cook them. I said, "I will give you a Sunday dinner provided you will eat in the kitchen." He said, "I can—I think I would rather enjoy that." After that he asked me how much I would charge for boarding him. I said I didn't feel like boarding anybody. He said that he would pay liberally and put up with what I had; that he didn't care for more than two meals a day, anyway. I finally said I would board and room him for $6 a week. He said, "That is very liberal indeed." He said, "I will pay more than that." I said, "That is my charge, $6 a week."

Q. He took the room, did he? A. Yes.

Q. Describe the room.

A. The room was a side room with two windows in in. It had been fitted up for light housekeeping, that is what Mr. and Mrs. Crawford used it for. I rented it for $4.50 a week and with his board I charged $6 a week.

(Testimony of Josephine C. Dabney.)

Q. Was this room so situated in the house that it was necessary for any one to pass through it to get into the other rooms? A. His room?

Q. Yes.

A. Yes, parties would have to pass through; in fact, I would really have to go through that room myself to get to the front door, or to Mr. and Mrs. Crawford's room. I had the privilege of going through that room when I rented it. He wanted to know what roomers would come through that room. I said the doctor and his wife. He said, "I can put up with that, if they can." I said I would speak to them about it. He said, "I have burglar alarms which I always put on anyway; I always put one on the window and one on the door," which he did.

Mr. HOLZHEIMER.—I object to this as immaterial and move to strike it.

The COURT.—Motion denied and exception allowed.

The WITNESS.—(Resuming.) He said he used those because of the work he was doing, paying off the men, and the like of that, that he might have quite a good deal of money to pay off these men, and not only that, he had Government papers that were very valuable, and he wanted them to be secure and later on he hired a man to look after these papers.

Q. About when was this?

A. About the 11th of June he came there and took the room. I think it was about—the 11th of May, I would say.

(Testimony of Josephine C. Dabney.)

Q. When was that that he hired this man to look after these papers that you spoke about?

A. I think it was the second week that he was there that he hired the man.

Q. What papers did he say that he had there?

A. Governmental papers was what they were, he said. I never saw none of the papers. I took his word for it because he said he was working for the United States Secret Service, and I supposed of course that he was.

Q. What did he have in his room in the way of luggage, if anything?

A. A trunk and a satchel which he was always anxious about keeping, in fact, he took the trunk and he wanted to know if I would put up with having it in the little hall that went from his room into the kitchen. I said yes, so he put it in there and he had a small satchel which he kept locked up in the clothes-press. He was always anxious about things like that. He said he had papers of great value and he wanted to be careful of them, not only that, he said he had private papers that were valuable to him, and he showed me papers that were in long enevlopes—supposed to be. He also showed me a letter that President Roosevelt sent, as I understood.

Q. You didn't see the documents?

A. No, I didn't ever attempt to read those things; I would not have understood it probably, if I had; I did my own work and had no time to bother with it.

Q. Did he ever show you anything representative of his position?

(Testimony of Josephine C. Dabney.)

A. Why, these papers and then he one day when he went to go to town, he reached in his hip-pocket, I think, and held out a badge in his hand and said that gives me the right to do what I am doing; it was a badge with a pin on it; I don't know what it was; I don't know what the Secret Service badge is.

Q. You didn't take it in your hand?

A. No, I did not. I did not think the man would take it out and show it to me unless it was what he said.

Mr. HOLZHEIMER.—Objected to as immaterial.

Objection sustained.

Q. Did you at any other time see any other papers or matters in his room?

A. At one time I was in the room—he said he was going to town and I supposed he had gone, and I went in there and he was there, and he had his satchel there. He was very systematic in his habits, and very particular, and he seemed to be fixing something in the satchel, and on the table and on the chair he had something that appeared to be about that length and about that wide. (Indicating.)

Mr. HOLZHEIMER.—I object to that as immaterial.

Objection overruled and exception noted.

The WITNESS. (Resuming.) That looked like money.

Q. What did it look like?

A. It looked like money.

Mr. HOLZHEIMER.—I move to strike the answer of the witness.

(Testimony of Josephine C. Dabney.)

The COURT.—Motion denied.

The WITNESS.—(Resuming.) It looked like money—like plates of some kind.

Q. Like paper money?

A. Yes, like paper money, a package that looked like money.

Mr. HOLZHEIMER.—I move to strike out the testimony of the witness in reference to the package that looked like money that she saw in his room, for the reason that it is incompetent and prejudicial, and further there is nothing to indicate what it was, or any statements made with reference to that, or as to its character, and whether it had anything to do with the issues here.

The COURT.—Motion to strike out denied and exception allowed.

The WITNESS.—(Resuming.) He said that was some work that he had done in the United States Secret Service, that is the answer he made, and he picked it up and put it in his satchel.

Q. How long did he remain at your house and obtain board and lodging from you?

A. He came there about the 11th of May and stayed until about the 17th of June. I would not be positive as to the exact dates. The way I think it was the 17th of June, my birthday was the 14th and he was there two or three days after it.

Q. Did he keep this same room and have this same board at the same price all this time?

A. Yes, sir, he did.

Q. Did he ever pay you for this?

(Testimony of Josephine C. Dabney.)

A. No, he didn't pay me. He never paid me *or anything* about it only one day—I didn't ask him as I would other roomers, because I thought a man that was working in that kind of business, I could have the money at any time, and I wanted to get some dental work done—

Mr. HOLZHEIMER.—Objected to and move to strike the testimony.

The COURT.—Motion denied. Objection overruled and exception allowed.

The WITNESS.—(Resuming.) I thought I could have it all at one time and it didn't make any difference to me; of course I trusted him under those circumstances.

Mr. HOLZHEIMER.—I move to strike the answer of the witness as being incompetent and irrelevant under the issues here.

The COURT.—Motion denied and exception allowed.

Q. Did he pay you that sum for the board and lodging? A. No, he did not.

Q. For these days that he remained there?

A. No. I was to have it, I think it was Wednesday, and went down and made a date with the dentist to have some dental work done. He said he would have the money ready for me but he went away the night before and he hadn't paid me anythink at all.

Q. How much did that aggregate?

(Testimony of Josephine C. Dabney.)

A. About $30, but he owed me money besides that. He had borrowed money of me at different times.

Q. At what times?

A. The first money he borrowed the first week he was in the house, he got $2.

Q. How did he get it and under what circumstances?

A. He said he was short and he couldn't get his father because his father was out on the road paying off the men of the Michigan Central railroad, and he couldn't get his money; that he had overdrawn and it would be just a matter of a few days or hours that he would get it. He said it was something he had never had to do before, to borrow money from a lady, and I gave him the $2.

Q. You say that was the second week?

A. That was the first week that he was there.

Q. After that at any time did he ever get money from you? A. Yes, he got $5 at another time.

Q. About when was that?

A. I think it was the last week he was there. It was a laundry bill; the way he came to get the $5, I went to the door and there was a party there said, "I have Captain Littell's laundry." I told him that the laundryman was there, and he went out and in a few minutes he came back and said, "He can't change this $20 in gold." I said, "I have $5 I have just taken in from Mr. Crawford," and I handed him that. He never paid me that or the $2 that I let him have at another time.

(Testimony of Josephine C. Dabney.)

Q. Did he at any other time ever get any sums of money from you?

A. There was another time he called in a junk-man to sell the clothes and things that was in the cellar or in the basement.

Q. Did he do that at your request?

A. He was going to sell off some of his clothes, and I had some things, and I said, "I would rather have the Salvation Army take them?" He said, "What is the use of bothering? We will give money to the girls." He didn't give it to the girls. He sold the goods and retained the money himself. Then there was only $10 that he got that he didn't give me back. His excuse was that he would pay me back—would pay me when we got to the house but he didn't do it. I didn't ask him for it because I supposed it was as good as gold.

Q. You saw him have this $20 gold piece, did you? A. Yes. I saw him have that.

Q. Under what belief did you loan him this money?

Mr. HOLZHEIMER.—I object to that as calling for a conclusion and as incompetent what her belief was.

The COURT.—I think that is a fact, that she knows better than anybody else.

Mr. HOLZHEIMER.—I object to it as incompetent, irrelevant and immaterial for any purpose.

Objection overruled and exception allowed.

The WITNESS.—(Resuming.) From his being a United States Secret Service man I trusted him,

of course, because all the rest of my roomers always paid me in advance, and I supposed that I could get that from him at any time when I wanted, to get my teeth filled, and that was the reason I didn't ask him for it before. He was down there to the dentist and made a date at the same time that I was there. He had a tooth filled. I went and had my teeth fixed as per agreement—I am kind of ahead of time —he said that he would send me the money; he was called away, went to North Yakima. He came up one day and said, "Captain Hancock is going to relieve me of my duties in the Secret Service"—he was going to relieve me, he said,—he said Captain Hancock was out riding in an automobile and met with an accident and got his leg broke, and he said, "I will have to resume my duties until some one comes to relieve me." His excuse was to me that he was going to North Yakima to pay off men in the United States Secret Service. I spoke to him about the accident. I said, "It will be in the paper." He said, "Oh, no, it will not be in the paper because Captain Hancock's wife is not very strong and he don't want his family to hear of it, and he paid the editors to keep it out of the papers for their benefit."

Q. Were there any other sums of money that he received from you?

A. I sold out my rooming-house while he was there.

Q. When was that?

A. About the third week he was there, as near as I can remember, the third or fourth, I wouldn't

(Testimony of Josephine C. Dabney.)

just say. I sold it for $1,000. Of course I didn't have that out of it; I was a little in debt. I had to pay my rent out of it. I think I had about $950 after I paid the rent. I don't know as I had quite that; somewheres around there. It ran along then, it might have been a week, and he came up one afternoon in the rush act and said, "I am short here, and it means a thousand dollars to me, but," he says, "I can't reach my father by wire, I can't get him, and I don't know what to do." He wanted to know if I would loan him $600, and he says more if I could spare it. I said, "What security have you or what would you give me for that money?" He said a draft. He said, "I will draw it on my father." He said, "As soon as you will go East—" he said, "You are going East and it is collectible there." He said, "My father is my financier." He drew that draft and gave it to me.

Q. Did you ever see that? (Showing paper to witness.) A. Yes, that is the one.

Q. That is the draft he gave you?

A. Yes, that is the draft he gave me.

Q. Did he make it out in your presence?

A. He had it made out; he handed it to me.

Q. He had it made out before he came to you?

A. Yes.

Q. What did you do with it?

A. I kept it; at one time he asked me about that draft. He said, "Have you that draft yet?" I said, "Yes, certainly." He said, "Take care of it." I said, "I intend to." I said "Why?"

(Testimony of Josephine C. Dabney.)

Q. You let him have $600 did you, and took the draft? A. I did.

Q. On what belief or what representations did you permit him to get that money?

A. On account of his claim to be an officer of the United States Secret Service, doing the work that he was doing. I supposed he was prominent, that there was no man that could hold that office without money.

Mr. HOLZHEIMER.—I move to strike the testimony of the witness as not being responsive, and a conclusion of the witness and being wholly immaterial and incompetent under the issues in this case, and not competent for any purpose.

The COURT.—Motion to strike out is denied. Exception allowed.

Q. If you had believed that he was not in the Secret Service employ, as represented by him, would you have loaned him this money?

Objected to as leading. Objection sustained.

Q. Did you ever go down town in the company of the defendant?

A. Yes, I went downtown two or three different times with him, and twice we went by the Federal Building, and the first time we went by there, he stopped and went up there. He said he would have to stop and go up there and see how they were getting along in that building. He said, "This here work is just killing me." He said, "These men would shame a snail, they were so slow." That was the first time; the next time he went down by there,

(Testimony of Josephine C. Dabney.)

he stopped for a few minutes and went on downtown. He went as far as the Barker Hotel, and went in there, and I went on down to the store.

Q. Did you ever see these? A. Yes.

Q. What are they?

A. Burglar alarms such as he used while there in my house, and the way he used them, he put these two prongs at the bottom and when anyone would push on the window or door at once it would ring.

Mr. HOLZHEIMER.—We renew our objection to strike any testimony of this witness in reference to the burglar alarms on the ground that it is incompetent and immaterial for any purpose under the issues in this case.

The COURT.—What connection does that have with the case?

Mr. HUTSON.—We will show by other witnesses in the case, and that this man was not what he represented himself to be and did not want to be molested, show by his actions before he left the house that he was continually afraid of being molested; it is simply a circumstance.

The COURT.—I think that his whole course of conduct with this witness shows that; I will allow you to prove the facts within your opening statement by which the jury may judge of the matters in issue.

Objection overruled and exception allowed.

Mr. HUTSON.—I offer these burglar alarms in evidence and I also offer this draft for $600 in evidence.

(Testimony of Josephine C. Dabney.)

Mr. HOLZHEIMER.—We object to the introduction of the burglar alarms but have no objection to the draft.

The COURT.—Objection overruled; let them be admitted. Exception noted.

Q. Did you ever have a conversation with the defendant relative to these burglar alarms and why he put them on?

A. Only that he said that he wanted to be careful and always on the alert when he was working on that building and paying off these men. He said he made enemies, and he had those Government papers that he wanted to care for, and while there in my house he gave me strict caution not to tell anyone that he was rooming there—not to tell anyone.

Q. Did you ever have any conversation with the defendant relative to telephoning?

A. Yes, he came to me one day all in a rush and said, "That man that I have hired to take care of these papers for me has exposed me." He said, "That means a good deal to me; I have paid him wages beyond his expectations,"—

Mr. HOLZHEIMER.—I object to this question as incompetent, irrelevant and immaterial and move to strike out the answer, so far as not being responsive.

The COURT.—I have indicated what my ruling would be; I am going to allow all the conversations and all the conduct of the defendant to be given in evidence by this witness; now instead of breaking

(Testimony of Josephine C. Dabney.)

in and obstructing the witness, you may have your exceptions right along.

Mr. HOLZHEIMER.—The jury are the judge as to her motives and his conduct.

The COURT.—Yes, the conduct of the defendant is to be judged in the light of this testimony. Exception allowed.

Q. Go ahead.

A. He said this man that was taking care of the papers had exposed him, what kind of work he was doing, and what the papers was. He said, "I am just going to call him up on the 'phone." He said, "I will call him up, and you come along with me or I will forget my language as a gentleman. He called up the party, as I supposed, and talked for quite a while, and talked very angrily, and pounded on the wall, and seemed to be talking about his caring for his papers.

Q. What papers?

A. Governmental papers, that is what he told me they were.

Q. That is what he told you? A. Yes.

Q. About when did he leave your place?

A. About the 17th of June.

Q. Did you know that he was going?

A. No, I didn't, only that he was going over there to pay off those men for Captain Hancock. He said—his excuse was for going away and taking his satchel out of the place was, that his father had come from Detroit, and he was going down to the

(Testimony of Josephine C. Dabney.)

Savoy and stay with him there. Of course he got the trunk and satchel out; the next day he was to go over to North Yakima to pay off those men for Captain Hancock; that is what he told me.

Q. Did you ever see this? (Showing paper to witness.) A. Yes, I have.

Q. When, and what is it?

A. That is the letter that he sent to me by special messenger the night that he went away.

Q. Did you ever see any of the handwriting of Mr. Littell, the defendant? A. Yes.

Q. You have seen it a number of times, have you?

A. Yes.

Q. Where?

A. In my house; he did the figuring and writing in selling my place.

Q. Do you know whose writing that is?

A. Captain George Littell's.

Mr. HUTSON.—We introduce this in evidence.

Mr. HOLZHEIMER.—Wasn't there an address on there? A. No, just my name.

Q. Just your name; did you tear it off?

A. Yes.

Mr. Hutson read the letter in question to the jury.

Q. Where this shows a line drawn through it, is that as you received it?

A. Yes, that is just as I received it.

Q. Did you ever see that before? (Showing paper to witness.)

A. Yes, that is a telegram that I received.

(Testimony of Josephine C. Dabney.)

Q. State what it is. Read it.

A. It says: "Billings, Montana, June 20th. Mrs. Josephine Dabney, 614 University St., Seattle, Wash. Returning to-night. Don't worry. Satisfactory explanations. Had to leave unexpectedly. George."

Q. You received that before or after he left?

A. After, the second afternoon afterwards.

Mr. HUTSON.—I introduce this telegram in evidence.

Mr. HOLZHEIMER.—Objected to as incompetent, irrelevant and immaterial, for any purpose under the issues of this case.

The COURT.—Objection overruled. Exception noted.

Q. Has this draft for $600 ever been paid to you?

A. It has not.

Q. Have you taken any steps to collect it?

A. I simply sent it to the bank, sent it two different times; the third time I sent it, it was protested.

Q. It has never been paid to you?

A. It has not.

Q. When was the next time you saw the defendant? A. After he left my house?

Q. Yes.

A. When I went down to San Francisco on the preliminary hearing.

Q. In this case? A. Yes.

Q. About when was that?

A. About what date was it?

Q. Yes.

(Testimony of Josephine C. Dabney.)

A. I started the fifth of June—no—I don't know as I can tell you what time it was.

Q. About how long was it after he left your house before you saw him again at the preliminary hearing? A. It was about a year.

Q. Did you ever have any direct communication with him after he left your house?

A. I did not.

Cross-examination.

(By Mr. HOLZHEIMER.)

Q. Your name is Josephine Dabney?

A. Yes.

Q. Jim Dabney was your husband?

A. No; his name was Thomas L. Dabney.

Q. How long have you lived in Seattle?

A. About four years.

Q. You spoke of two children; are they daughters of Mr. Dabney? A. No.

Q. When were you married to Mr. Dabney?

A. Three years ago the 14th of June.

Q. Is Mr. Dabney living?

A. Yes, sir.

Q. You are divorced from him?

A. Yes, I am.

Q. When were you divorced?

A. I have been divorced from him—let's see; it's a year; I think it was a year ago in March.

Q. On the 23d of March, 1907?

A. It was in March some time; I don't just remember what time.

(Testimony of Josephine C. Dabney.)

Q. What time did Littell call at your house?

A. The first of May.

Q. A month—about a month after your divorce?

A. It was more than a month.

Q. From the 23d of March to about the first of May—how long after that did you put this advertisement in the paper, after your divorce?

A. Well, it was the first of May.

Q. That you put this advertisement in the paper?

A. Yes.

Q. Do you remember what paper you put that in? A. The "Times."

Q. Do you remember the wording of that ad.?

A. I think I do.

Q. Will you repeat it?

A. "Middle-aged refined lady wishes acquaintance of a worthy gentleman of same age with city references."

Q. Anything further?

A. "Object matrimony." You have to add that before they will insert it in the paper.

Q. That was practically within one month after the divorce was granted?

A. I couldn't say as to that.

Q. It was the 23d of March, 1907, you were divorced, and that was the first of May?

A. Yes.

Q. Now, you say you met Mr. Littell in response to that advertisement? A. I did.

(Testimony of Josephine C. Dabney.)

Q. Wasn't that what brought him there—wasn't that the subject of the conversation when he came there?

A. He introduced himself first, as I stated.

Q. In answer to that advertisement?

A. Yes.

Q. Was that the understanding between you and Mr. Littell practically during his sojourn in your house? A. Was what the understanding?

Q. The question of matrimony.

A. No, not entirely.

Q. How much of it was?

A. Matrimony was not mentioned to me until the third week that he was there; then he asked me to marry him.

Q. Didn't he come there in answer to an advertisement of yours which said "Object, matrimony?"

A. I said he did.

Q. Wasn't there anything said at that time about it? A. No, sir.

Q. How did he introduce himself?

A. He introduced himself as Captain George Littell of the United States Secret Service work, and in answer to my personal in the paper.

Q. And wasn't that personal in the paper—wasn't that in answer to your advertisement for a husband?

A. I didn't advertise for a husband; I advertised for a gentleman acquaintance.

Q. "Object, matrimony."

(Testimony of Josephine C. Dabney.)

A. Of course, it has to be, or it wouldn't be inserted.

Q. Then you knew when he called at your house that it was in answer to your advertisement?

A. Certainly.

Q. You say that you loaned Mr. Littell the sum of $2 at one time? A. I did.

Q. And $5 at another time? A. Yes.

Q. And finally $600? A. Yes.

Q. That is correct? A. Yes.

Q. Did he ever give you any money?

A. Gave me $5 at one time, and borrowed that back.

Q. Did he ever pay out any money for you?

A. No, sir.

Q. Did he ever go to the grocery store and pay out any money for you?

A. Not that I asked him to. I was paying my own bills. He went with me to one store one night, but not with the intention of getting any groceries; I started to go to the grocery store, and he said, "What is the matter with my walking with you?" He went along with me; I was getting a few things, I think about 75 cents' worth. I know that night he was taking some oranges at 5 cents apiece and when he came to pay, he paid the whole amount; threw down the money for the whole amount; that was the only time he ever paid for anything for me.

Q. Did he at various times pay out for the groceries for you? A. No, sir, he did not.

(Testimony of Josephine C. Dabney.)

Q. Was not that an understanding between you?

A. It was not.

Q. Did he not pay out $30 for you for your daughters to have moles removed?

A. He paid out money, but what he paid out I don't know. It was at his own suggestion. He wanted to be a good fellow while there, I suppose. I don't know. He wanted to know if the girls didn't want to have their moles removed. I objected to it at first, until one day he came there to remove those moles. I said, "I have no money to put in anything like that." He did it of his own free will; what it cost I don't know.

Q. You say you are living now in Los Angeles?

A. Yes.

Q. When did you go there?

A. I started the 5th of June.

Q. This last June? A. Yes.

Q. When did you first make up your mind that Mr. Littell borrowed this money from you as a Secret Service officer?

A. When did I first make up my mind?

Q. Yes.

A. Why, right along; he was representing himself as such to me.

Q. Did he ever borrow any money from you on the strength of being a Secret Service officer?

A. He certainly did. I would have let nobody have it unless I believed they were in that work.

Q. What did he say to you when he borrowed it?

(Testimony of Josephine C. Dabney.)

A. He said it was just as good as gold. I said, "I will have to have security of some kind." I said, "if anything happens to you, what have I got to show, although you are a United States Secret Service man?"

Q. When did you let him have this $600?

A. When did I let him have it?

Q. Yes.

A. I think it was about the third week he was there or the last of the second week; I wouldn't say.

Q. Didn't you say that you let him have the $600 prior to his giving you the draft?

A. He took the money and then he wrote out the draft and gave it to me.

Q. Whereabouts did he write it out?

A. I don't know where he wrote it.

Q. You say he took the money and then wrote out the draft? A. He went in his room.

Q. Didn't you tell Mr. Hutson that he brought that draft to you before he got the money?

A. If I did, I must have made a mistake.

Q. It is not so; he got the money and then brought you the draft?

A. Yes, sir, he didn't know how much he could get.

Q. You told Mr. Hutson that he had the draft already prepared.

A. I was hasty in answering; that was a mistake.

Q. When you sold your place within three weeks afterwards, you sold it, you say, for $1,000. Is that correct? A. Yes, sir.

(Testimony of Josephine C. Dabney.)

Q. At that time was there a conversation between you and Littell relative to marriage and what was it? A. Yes, he asked me to marry him.

Q. What did you say?

A. I said, "It don't seem to me that I know you quite well enough yet, to marry a man, to engage myself to you." He said, "I know you well enough. I don't see any use in our going together for any length of time. I think it might just as well be settled first as last." It was the next day after that, he came out and told both of my girls, he said, "I don't know how you girls will take it." He went up and told the little one, youngest one, put his arm around her and kissed her; he said, "I don't know about doing this with Ruby" he said, "when she sees what I am doing for her and for you all, she will act differently."

Q. It was understood you were to be married?

A. Yes.

Q. Was not that the whole secret of your loaning him this money? A. It was not.

Q. Didn't you think he had a great deal of money? A. No, I don't think any woman—

Q. (Interrupting.) Didn't you think it?

A. No, I didn't think it.

Q. Who wrote to Mr. Littell's father in Detroit?

A. I did.

Q. When? A. Shortly after he went away.

Q. You wrote to Mr. Littell yourself?

A. I did.

Q. Mr. W. H. Littell at Detroit? A. Yes.

(Testimony of Josephine C. Dabney.)

Q. Did you mention to Mr. Littell, George's father, anything of the kind, any question as to his being a United States officer at that time?

A. I don't think I did.

Q. Did you mention it in any letter?

A. In none of my letters.

Q. Didn't you get one W. H. Minzer to write to George Littell's father?

A. I didn't get nobody to write to him.

Q. Upon whose solicitation did Mr. Minzer write to Mr. Littell—do you know anything about it?

A. I do; he came to me—he went with a Mrs. Wilcox—she told me at one time—the question came up and he volunteered to write these letters. He said he thought probably it would do more good for a man to write than for me. I said, "You needn't do anything of the kind for me." I said, "If you want to, you have got the privilige to do it." I never asked him to do it.

Q. You say he was going with Mrs. Wilcox?

A. Yes, sir.

Q. He was going for a while afterwards with Mrs. Dabney, was he not?

Mr. HUTSON.—I object to that.

A. No, sir.

Q. After the defendant left?

The COURT.—Objection overruled.

Q. Isn't that so? A. What?

Q. That immediately thereafter you went with Mr. Minzer, the man that wrote this letter to Littell's father?

(Testimony of Josephine C. Dabney.)

A. No, he didn't commence going with me until along about the last of November.

Q. You did then go with him? A. Yes.

Q. Where did you and Mr. Menzer go?

A. Where did we go?

Q. Yes. A. Several places.

Q. Didn't you leave town? A. No.

Q. Weren't you with him in Oakland?

A. I was not. I would say it on my dying bed, I was not with him.

Q. Wasn't you with him in Los Angeles?

A. I was not.

Q. Mr. Menzer moved up to your house, did he not? A. He did not.

Q. Didn't he live up here to your house?

A. No, sir.

Q. Didn't you get Mr. Minzer to look after your money for you?

A. Did he look after my money for me?

Q. Yes.

A. He did in this way: he went down to the Secret Service men and talked with them about it, merely stated the facts as I had told him. He wanted to know if he could go and do that, and I said very well.

Q. Maybe I have it wrong. When you said that, did you go to his house? A. No.

Q. Did you at any time live in the same house?

A. I did not.

Q. Did you see Mr. Minzer at any time while you were south? A. No, I have not seen him.

(Testimony of Josephine C. Dabney.)

Q. Have you seen him since you came back?

A. I have.

Q. When? Did you come this morning or last night? A. I came last night.

Q. Did you see him this morning or last night?

A. I seen him last night; he was there at the depot. I don't know how he knew I was coming, or anything about it.

Q. Now, the money that he borrowed from you —he borrowed this money, from you, did he not?

A. What money?

Q. Any money? A. Yes.

Q. What was the first money that he borrowed from you? A. $2.

Q. How long after he had been there?

A. I think he had been there nearly a week.

Q. Did he pay any board in that time?

A. He did not.

Q. Then he borrowed some more money from you, did he? A. Yes, sir.

Q. How much was that? A. That was $5.

Q. Had he paid any board at that time?

A. He had not.

Q. Then he borrowed that $600?

A. He borrowed the $600, yes, he got the $600 from me.

Q. What date was that, do you remember—the 11th? Is that correct?

—*June 11th, it speaks for itself.*

A. I couldn't just swear as to the date.

(Testimony of Josephine C. Dabney.)

Q. He borrowed the money from you and he gave you this draft the next day, didn't he?

A. He gave it to me the same day.

Q. He borrowed the money from you and then went out and made out the draft and brought it back to you—draft on his father? A. Yes.

Q. That was on the 10th or 11th and he remained how much longer in your house?

A. He was at my place until the 17th of June.

Q. Did you ever send this draft to his father?

A. No, sir.

Q. Why didn't you?

A. Because I intended to go east, that was the reason. I thought it was just as well the way it was.

Q. You intended to go east with him?

A. Yes, sir.

Q. What did you keep the draft for?

A. What did I keep it for?

Q. Yes; didn't he give you this draft to send to his father?

A. No, I kept that for security and then I was to cash it in Detroit.

Q. On his father? A. Yes.

Q. Did he ever ask you about it?

A. No, only once he asked me if I had the draft. I said, "Yes," he said, "Take care of it." I said, "Of course I will take care of it."

Q. You never told him you couldn't find it?

A. No, I never did because I knew where it was.

(Testimony of Josephine C. Dabney.)

Q. Did he ever come to you and ask you for the draft, say that he wanted to settle for it?

A. That he wanted to settle for it?

Q. Yes. A. Never, no, sir.

Q. And you said you couldn't find it?

A. No, I never said no such words and that draft never was mentioned only once.

Q. Was the engagement broken off between you at any time? A. At any time? No, sir.

Q. You say that Mr. Littell had something in his room that represented money; do you know whether or not it was a stock certificate or money? Do you know that?

A. Do I know? What do you mean?

Q. You say you saw something lying on his table, something that looked like money to you?

A. It was just about the size of paper money.

Q. You wouldn't know whether they were stock certificates or not, would you?

A. No, I would not.

Q. You would not say they were not, would you?

A. No, I could not. I lifted them up and could see they were heavy.

Q. And you still thought it was money?

A. No, I didn't. I knew different then, when I lifted them up, the heft of it.

Q. Were there a good many papers there?

A. What do you mean?

Q. Were there a good many papers there?

A. On the table or do you mean in his possession.

Q. On the table there, when you saw them.

(Testimony of Josephine C. Dabney.)

A. I didn't see no papers on the table then; he showed me envelopes that were supposd to contain Government papers valuable papers.

Q. Didn't you have your trunk all packed to go east with him. A. No, I didn't.

Q. When did you expect to go east?

A. The next week after he went away.

Q. Did you tell a reporter in an interview with him that you had your trunk already packed to go east? A. I hadn't got my trunk all packed.

Objected to as incompetent, irrelevant and immaterial.

Q. You say that Mr. Littell went with you to the dentist's? A. Yes.

Q. Did he make arrangements for the dental work?

A. He asked me what day I was to be there. I told him I wanted to be there on Wednesday. Then when he came to go away, he sent this special messenger saying that the money would be there not later than 8 o'clock. I went to Mr. Phillips, the dentist, who filled between my teeth, two of them; then came this telegram and I began to suspect that he was not coming back, and I went to Mr. Phillips and told him if I ever got any money I would come back to him and pay him, but since then I have had to have two of the teeth out.

Q. Mr. Littell lived at your house about three weeks? A. He was there longer than that.

Q. How much longer?

(Testimony of Josephine C. Dabney.)

A. He came there about the 9th or 11th of May and stayed until about the 17th of June.

Q. Are you sure of that? Have you got anything by which you can be sure of that?

A. No, I can't be sure of that.

Q. You would not say that it was not the 18th of May?

A. It was not the 18th of May, for Mr. and Mrs. Crawford came there about that time. It was not later than the 11th of May.

Q. He said to you that he came from the Lincoln Hotel? A. That is what he told me.

Q. All the time he was there, you say, he held himself out to be a United States Secret Service officer? A. Yes, sir.

Q. What particular department.

A. The treasury department.

Q. You lived up on University? A. Yes.

Q. You came down town with him several times, didn't you?

A. Not more than four times, I don't think, anyway.

Q. Did you ever take any pains to inquire whether or not he was what he said he was?

A. Had I taken any pains?

Q. Yes.

A. I did not; if he had been in any other kind of business I should have.

Q. Did that interest you, what his business was?

A. It certainly did.

(Testimony of Josephine C. Dabney.)

Q. You were about to marry the man and you never took any pains to discover whether he was what he said he was? A. I did not.

Q. And he was borrowing money from you all the time?

A. He borrowed that $5 of me and $2.

Q. And $600? A. Yes.

Q. When did he borrow the $10 from you?

A. That was deposited on my goods, that $10. He went and took this up and never handed it back to me but kept it.

Q. Was that after the $600 or before?

A. That was before.

Q. After he got the $600 he was there still at the house from the 11th to the 17th? Is that correct? A. Yes.

Q. You say that he left the house and went to the Savoy? A. Yes, that is what he said.

Q. And took his things out of the house?

A. Yes.

Q. Did you ask him for the $600 then?

A. Did I ask him? No, I didn't because he was going down to be with his father.

Q. But at this time when he left the house and after he had borrowed the $600, you had consummated that theory that he came there on, and carried out the idea, and become engaged. Isn't that true? A. How was that?

Q. (Question read.)

A. Yes.

(Testimony of Josephine C. Dabney.)

Q. When he entered your house, that was the purpose? A. No.

Q. And that is why he came there?

A. Why he came there?

Q. Yes.

A. That is why he came there.

Q. That is why you invited him in?

A. Yes.

Q. You say that he had a trunk. Did he have a trunk at all? A. Yes.

Q. Now, what did he show you? You say he showed you something and said that was his right to do what he was doing what was it like?

A. It put me in mind of a policeman's badge.

Q. Was it a badge? A. Yes.

Q. Nickel? A. Yes, a nickel badge.

Q. Did you look at it?

A. I did not; I did not take it up at all, he held it in his hand.

Q. You were not interested in that part of it at all, were you?

A. I was interested in it in a way but I took his word for it; I thought he would not show me such a thing unless it was a fact; I had the utmost confidence in him.

Q. Isn't this a fact, that when you loaned him the money, you loaned it for his own self, because you were in love with him and liked him?

A. No, I didn't loan it in that way at all; he didn't ask it in that way.

(Testimony of Josephine C. Dabney.)

Q. Didn't you do that, the question of his being a Secret Service Officer had nothing to do with your loaning him the money.

A. It certainly did. I would never have had the confidence in him that I had, if he had not represented himself to be that.

Q. Suppose that he had told you that he was a banker?

A. Then I could find out whether he was or not.

Q. If he represented himself to be a Secret Service officer couldn't you find out whether he was or not?

A. I took his word because I had no idea that a man had a right to do anything like that, and believed it was a fact.

Q. Did you ever go down to the Government building to find out?

A. No, I didn't. I didn't think the man would walk over there and act as though he was talking business if he was not in that kind of work.

Q. That is only a very short distance from where you lived, is it not?

A. A short distance; yes.

Q. To whom did you first talk about this Secret Service business after Mr. Littell had gone away?

A. I didn't talk with any one only just Mr. Crawford. I asked him. I said, "It don't seem to me that a man had a right to come in there and represent himself as a United States Secret Service man, and he did that for the purpose of robbing me.

(Testimony of Josephine C. Dabney.)

Mr. HOLZHEIMER.—I move to strike out that part of the witness' answer as not responsive.

The COURT.—Motion denied. Exception noted.

Q. When did you first talk to the officers about it, or did you do it, or did Mr. Minzer do it?

A. No, Mr. Crawford sent the officer up to me.

Q. When was this?

A. I don't just remember when it was.

Q. How long was it after Mr. Littell had gone?

A. I couldn't just say how long it was.

Q. Approximately? A. Perhaps a week.

Q. About a week afterwards?

A. I think so.

Q. And you now say, Mrs. Dabney, that it was not due to the instigation of Mr. Minzer that you had Mr. Littell arrested? A. No, sir.

Q. And it was not through his information and his statement to you that you first thought anything about his being a United States officer?

A. No, sir.

Q. Thinking that in that way you could get him back and do something with him when you couldn't otherwise? A. No.

Q. Did you ever see this card before? (Showing card to witness, or one similar to it.)

A. No, I never saw it.

Q. You saw his things there, didn't you?

A. Yes.

Q. You were in there and talked to him about business matters, you say, at various times?

(Testimony of Josephine C. Dabney.)

A. Yes.

Q. You never saw anything about that?

A. No, I never did. I saw letters from his father. I didn't read them; he read them to me. He said his father was the treasurer of the Michigan Central Railroad.

Q. Isn't it a fact that the only question—the question of United States business that he ever told you was that he was with the United States Map Company?

A. No, he never mentioned that to me.

Q. Never mentioned it to you? A. No.

Q. And that he was secretary and treasurer of the United States Map Company?

A. No, he didn't tell me that.

Q. And you never saw anything like that before?

A. I never did.

Q. Did you ever see any of the letters that Mr. Minzer wrote to his father? A. I did not.

Q. And you now say that you never met Mr. Menzer in Los Angeles and Oakland?

A. Yes, and I would say it on my deathbed with my last breath.

Q. Have you had any correspondence with Mr. Minzer since you left here?

A. I have not; I know nothing about Mr. Minzer since I left here.

Q. Did he meet you at the train?

A. Yes, he did, but I don't know how he found out that I would be there.

(Testimony of Josephine C. Dabney.)

Q. Are you and Mr. Minzer engaged?

A. No, sir.

Q. Were you ever? A. No, sir.

Q. Did Mr. Minzer and you ever have a bank account together?

A. No, I had no bank account; I am perfectly penniless in this world. I borrowed money from my brother to go down there with.

Q. What were you doing down there?

A. I was down there with my brother; I was not able to work, have not been able to work, because my girls are away from home, because I had no place for them.

Q. Your girls went east?

A. Yes, went east because I had no place for them.

Q. You are just as positive about the last answers you gave me in regard to Mr. Minzer as you are as to any other testimony you have given here, are you, Mrs. Dabney? A. I am.

Q. At that time that Mr. Littell came to your house, did you tell him—what did you say, about the question of your former marriage, did you say anything about that?

A. I don't know how you mean.

Q. Did you tell him you were divorced from Mr. Dabney? A. I did.

Q. You did? A. Yes.

Q. How about the time the letters you got from Mr. Dabney that Mr. Littell found there in the room. Do you remember that occasion? A. No.

(Testimony of Josephine C. Dabney.)

Q. Did you know that Mr. Dabney was in Seattle the night he left here?

A. No, he was not here; he was with his brother in Oakland.

Q. And he hadn't been around here and wasn't here? A. No, he had not.

Q. Did you get a letter from Mr. Dabney?

A. I did, but I didn't write him. I had threatened to put restraining papers on that man to keep him away from me; why did I get my divorce? Simply because he was an habitual drunkard.

Q. When you went down to the bank to get this money, you had it all in the bank, didn't you?

A. Yes.

Q. Did Littell go with you? A. Yes.

Q. Did you draw out $600 or all of it?

A. I drew out $600.

Q. Didn't you draw out $1000?

A. I did not.

Q. What did Mr. Littell tell you that he wanted to borrow this money for, what did he want to use it for?

A. He claimed to be settling up an heirship property for people in the east and in buying out these heirs, why, he could make money. He had done it and could do it, and he came up in the rush act and got the money from me for that purpose.

Q. It was not anything in the line of this Federal business then?

A. I don't know why it was not; I would not have let him have the money otherwise.

(Testimony of Charles Crawford.)

Q. It was not anything in the line of his Federal work, was it?

A. No, but he got the money on my confidence. I would not have handed out the $600 to no man if he hadn't been a United States Secret Service man.

Q. He borrowed this money from you to put in some investment?

A. He borrowed it just on those grounds; I don't know what he done with it; that is what he told me he wanted to do with it.

(Witness excused.)

Short recess. After recess.

[Testimony of Charles Crawford.]

CHARLES CRAWFORD, called and produced as a witness on behalf of the United States, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. HUTSON.)

Q. What is your name?

A. Charles Crawford.

Q. Where do you live?

A. My home is in Cincinnati.

Q. Where were you living last year during the months of May and June?

A. 614 University Street.

Q. Seattle, King County, Washington.

A. Yes.

Q. What was your occupation then?

A. I was with the Rhodes Company .

Q. The Rhodes Mercantile Company of this city?

(Testimony of Charles Crawford.)

A. Yes.

Q. Was that your own home, 614 University Street?

A. No, I was living with Mrs. Dabney.

Q. Do you know her full name?

A. Josephine C., I guess.

Q. What sort of a house was it?

A. She kept furnished apartments and individual rooms.

Q. Who was there with you, if any one?

A. Why, quite a number of people.

Q. Are you married or single?

A. Married.

Q. Your wife was there with you? A. Yes.

Q. What time did you go there?

A. On the 13th day of May.

Q. Last year? A. Yes.

Q. How long did you stay there, about?

A. I stayed there, I can't say just how long. I was there up until, up around about September or October.

Q. Did you ever see the defendant before?

A. Yes.

Q. When and where and under what circumstances?

A. He was living with Mrs. Dabney.

Q. Living at this same house? A. Yes.

Q. Did he have a room there? A. Yes.

Q. About when did you first see him there?

A. It was after I came.

Q. After you came?

(Testimony of Charles Crawford.)

A. Yes, I saw him and it was after I came.

Q. Did you get acquainted with him?

A. Why, yes, I became acquainted with him.

Q. Ever have any conversation with him?

A. Yes.

Q. Did he ever tell you what his business was?

A. He told me he was connected with the Government in the capacity of a Secret Service man. He also said that he was connected with some land affairs of some kind, that was what he said to me, I think, that was about all he said to me, I think.

Q. Did he say it to you more than once?

A. Yes, on several occasions.

Q. Did you ever hear any conversations between the defendant and Mrs. Dabney when you were present and in hearing distance?

A. I never was in Mrs. Dabney's room when he was talking to her; there is a kitchenette, a little off room, with a gas range, so that we could cook, so that we could get our meals; the room was really a sort of passageway between the two rooms, and that divided it off, and we used one and Mrs. Dabney used the other; and the partition was so very frailly built—only built up about six or seven feet—it was easy to hear the conversation. Our table was just directly in front of it. I heard him tell Mrs. Dabney on different occasions about the paying off of men in the Government building and other conversations to that effect.

(Testimony of Charles Crawford.)

Q. State what those conversations were and let me ask you if you at that time knew Mrs. Dabney's voice and knew the defendant's voice?

A. Yes, he used to come home in the evening and say he was very tired, that the Government overtaxed him, worked him very hard. He said he had so and so on hand to do, etc.

Q. With reference to what?

A. Different work that he had to do for the Government.

Q. What was the nature of this partition between the two kitchenettes?

A. Just a few boards put up there without any plastering or any paper, you could see through the boards, you know.

Q. You mean the boards were not close together?

A. Not very accurately built, put up there by some one at the house, I guess.

Q. Did you see the defendant very often while you were there? A. What do you call often?

Q. How long do you think he was there?

A. How long he was there?

Q. Yes.

A. I think about around a month, right close to four weeks.

Q. Did you ever have occasion to see him in his room or in any of the other rooms in the house?

A. Occasionally, when I had occasion to go to the bathroom there, I used to go in there to wash, and I run into him several times.

(Testimony of Charles Crawford.)

Q. What condition did you find him in?

A. How do you mean?

Q. What was he doing?

A. Washing up, or something like that, or monkeying around a medicine chest, a little medicine chest above the wash-bowl there.

Q. What was he doing with that, if anything?

A. He had a hypodermic outfit.

Q. He had? A. Yes.

Q. Do you know what sort of an outfit it was?

A. Yes.

Q. Have you seen many such yourself?

A. Several, yes.

Q. What was it?

A. A little thing with a needle, a little sort of a syringe with a needle.

Q. Did you ever see him use it?

A. I don't think I did; I have seen him load it several times.

Mr. HOLZHEIMER.—I move to strike out the testimony as incompetent, irrelevant and immaterial.

The COURT.—The motion to strike is denied. Exception allowed.

Q. What did you see about his person, ever see anything when he was in there?

A. One day when I came home I was up at the store working and didn't get through until very late, and I went in the bathroom and he came in there in his night-robe and he had a gun under his robe.

Q. What kind of a gun? A. A revolver.

(Testimony of Charles Crawford.)

Q. When?

A. Had his hand like this (indicating in his breast).

Mr. HOLZHEIMER.—I move to strike out the answer as incompetent, irrelevant and immaterial.

Motion denied and exception noted.

Q. Did you ever walk down town with him?

A. Yes, one evening when I was going down to the store.

Q. Did you ever have any conversation with him at that time?

A. I said very little to him as little as possible.

Q. What way did you go down? Did you ever go down Third Avenue with him?

A. Third Avenue—let's see; no.

Q. Did you ever go by the Federal building with him? Yes.

Q. Did you ever have any conversation with him relative to it?

A. On that occasion, no; I was only in his company twice, two evenings, I mean outside of the house, you know. Once he walked down town with me and I walked down with him, and I went directly to the store, and the other evening I ran into him and he asked me to have a drink with him, and I had a drink or two, and I went up home.

Q. Did you ever have any conversation with him relative to his being relieved; answer yes or no.

A. No.

Q. Did you ever hear any?

(Testimony of Charles Crawford.)

A. Yes, I heard him tell Mrs. Dabney that he was relieved by Captain Hancock, that the Captain was sick, was hurt in an auto accident, if I remember distinctly, and was in some Hospital.

Q. What did you do, if anything?

A. I telephoned to some Hospital and found that there was no such man there.

Q. Do you recall the Hospital now?

A. I can't say certainly; I think it was the Providence, I am not sure.

Q. Did you have anything to do—did you ever see this before? (Showing draft to witness.)

A. Yes, when he gave that to Mrs. Dabney, I deposited it for her with Dexter-Horton.

Q. That is all you had to do with it?

A. Yes, practically all.

Q. Were you present when this transaction transpired between the two?

A. No, all I had to do with it was, I deposited it for her for collection.

Cross-examination.

(By Mr. HOLZHEIMER.)

Q. You say you heard these conversations between the defendant and Mrs. Dabney from the kitchenette that you were in and that they were in the other kitchenette? A. Yes.

Q. And you heard one conversation in particular about the question of one Mr. Hancock being hurt and taken to the Hospital? A. Yes.

Q. You called up by telephone the Hospital, didn't you? A. Yes.

(Testimony of Charles Crawford.)

Q. At whose solicitation? A. Nobody's.

Q. What made you do it?

A. Because I wanted to satisfy myself of several things.

Q. Did you tell Mrs. Dabney?

A. No, I did not; it was too delicate a proposition for me to say anything to her; I was not close enough to her.

Q. When did you deposit this draft?

A. I don't know just what time it was.

Q. After Littell had gone?

A. A few days after, or maybe a week after he wired from Billings.

Q. Then you deposited it for collection in the Dexter-Horton Bank? A. Yes.

(Witness excused.)

[Testimony of James Hilton.]

JAMES HILTON, called and produced as a witness on behalf of the United States, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. HUTSON.)

Q. What is your name? A. James Hilton.

Q. Where do you reside?

A. 403 East Lake Avenue, this city.

Q. Where did you reside in the months of May and June, 1907?

A. I was on Harrison Street but I forget the number, just the second door below where we are now.

(Testimony of James Hilton.)

Q. What was your occupation in May and June, 1907? A. Liquor dealer at the Hotel Barker.

Q. Did you ever see Mr. Littell before?

A. Yes.

Q. When and where?

A. I think it was between the months of May and June of last year.

Q. What name did you know him by, if any?

A. Captain Littell.

Q. How did you meet him?

A. In my place of business.

Q. Was he there frequently?

A. Quite often.

Q. Did you ever have any conversations with him during the times he was there?

A. Several times.

Q. What if any conversations did you have?

A. Well, I don't know particularly.

Mr. HOLZHEIMER.—I object to this question at this time, may it please the Court, on the ground that it tends to prove or attempts to prove some other offense at some other time. Unless a connection can be shown, these conversations with Mr. Littell at his saloon would be wholly incompetent; if it proves a separate and distinct offense it would not be competent.

Objection overruled and exception noted.

Q. State what, if any, conversations you had with him, if you recollect them.

A. You mean in regard to this case?

(Testimony of James Hilton.)

Q. Did you have any conversations with him relative to what he was doing in the city of Seattle?

A. One time we had quite a little conversation with him in regard to being a Secret Service officer here; he said he was chief of the Secret Service of Seattle.

Q. Did he tell you that?

A. He told me that positively.

Q. Once or more than once?

A. Several times.

Q. Did he say anything else about what he was doing?

A. Yes, he told me at one time that he was paymaster of the Federal building up here. At that time he asked me to go and change him some gold for paper in fifties, and hundred dollar bills so that he could pay his men off at the Federal Building.

Q. What did you do?

A. I went and got the change for him.

Q. Did he give you the money?

A. Yes.

Q. What did you do?

A. I did it at the Northern Bank and Trust Company. I got fifties and hundred dollar bills.

Q. What did you do with them?

A. Gave them to Captain Littell.

Q. Did you have any conversation with him at the time you gave it to him?

A. Not particularly, there might have been some conversation. I believe he asked me to come and

(Testimony of James Hilton.)

have a drink with him; it was idle conversation after that; I don't know what it was then.

Q. Did you have a safe? A. I had.

Q. What, if any, conversation did you have in reference to that safe?

A. He asked me at one time if he could deposit $10,000 of Government money there?

A. I told him no unless he could place a guard over it, armed with a gun, if he would do that, he could put it there.

Q. What, if anything, did he say?

A. He came back in the afternoon and said he had made other arrangements and didn't want to put it there.

Q. How long was that before he went away?

A. I don't think it was more than two or three days.

Q. Did he ever at any time have any money in your safe?

A. He did and he didn't. I had it and put it in the safe for a few moments before I went and got change.

Q. For this that you have spoken of?

A. Yes.

Q. Did you ever have any business transactions with the defendant?

A. I did with a watch once; I let him have a watch once.

Q. What sort of a watch?

A. A gold watch.

Q. How much was it worth?

(Testimony of James Hilton.)

A. That I couldn't tell you; I suppose $35 or $40, I don't know.

Q. What conversation, if any, did you have relative to that?

A. One time we were having a drink together and he told me he was busy, that he hadn't much time to wait, that he was getting witnesses together, that he was Judge Advocate of a court-martial at Fort Lawton.

Q. What else, if anything else?

A. I don't think of anything else more than idle conversation we had together.

Q. Did you let him have the watch then?

A. Oh, yes.

Q. Did you know anything about him, any further than what he represented himself to be?

A. I did not; I believed him to be what he said he was, a Secret Service officer.

Q. Did you ever get the watch back?

A. No, sir.

Q. Did you ever get paid for it? A. No, sir.

Q. Did he ever have anybody in his employ in your place, or did he seek to employ any one in there? A. He did.

Q. Who?

A. A man by the name of George Barnes.

Q. In what capacity?

A. Secretary, I believe.

Q. Of what? A. I don't know.

Q. Were you present when the conversation was had about the employment of Barnes?

(Testimony of James Hilton.)

A. No, only what Barnes told me, is all I know.

Q. You don't know anything about their conversation? A. No.

Q. And you say he said something about being Judge Advocate of a court-material, do you know when this was to take place?

A. It was to take place on Sunday; I thought it was kind of peculiar they were going to hold a court-martial on Sunday.

Q. Did he say any more about it afterwards?

A. No, not a word.

Q. And when, if at all, did he cease to come to your place?

A. I can't remember the date; I don't know. I missed him for two days and I went up to Mrs. Dabney's house to find out if she knew his whereabouts? She told me—

Mr. HOLZHEIMER.—Never mind what she told you.

Q. What did you do?

A. I asked Mrs. Dabney—

Q. (Interrupting.) Tell what you did in reference to the defendant after that.

A. I didn't do anything only I told him there were three or four telephones there and he was very much excited about it.

Q. About what you told him about the telephones? A. Yes.

Q. What did he say?

A. He became very much excited and rushed out of the place.

(Testimony of James Hilton.)

Q. Did you ever see him again?

A. Yes, a little while after that he came back there.

Q. Did you have a conversation with him?

A. Not after that until I met him in Frisco.

Q. When was that?

A. At the time I was down there with Mr. Foster, about six weeks ago.

Cross-examination.

(By Mr. HOLZHEIMER.)

Q. How old are you? A. 54.

Q. What has been you general occupation?

A. Nothing but liquor business.

Q. Been in the saloon business practically all your life? A. All my life.

Q. During your life as a saloon man, you have come in contact with many men, haven't you?

A. Quite a number, yes.

Q. Of a different kind and character in the saloon business. A. Yes, sir.

Q. What was the general conduct of the defendant in your place while you knew him?

A. A perfect gentleman.

Q. That is what you took him to be?

A. Yes.

Q. Did he ever at any time by fraud, or saying that he was an officer, attempt to beat you out of anything?

(Testimony of James Hilton.)

A. Out of the watch; he wouldn't never have got it unless he had told me that he was a Secret Service officer.

Q. Do you mean to tell me that? A. Yes.

Q. That because he claimed to be a Secret Service officer, you let him take this watch?

A. Yes.

Q. Prior to that, you had loaned him some rings, didn't you? A. Yes.

Q. Because you had them there for sale, didn't you? A. No, I didn't have them for sale.

Q. You would have sold them, wouldn't you?

A. Yes, I would do that.

Q. You let him take these two rings, and he brought them back, didn't he? A. Yes.

Q. Didn't this question about a watch come up one day because you were speaking about the question of watches, and he told you he had a good watch?

A. I don't remember that; I was opening the safe one day, and happened to pull the drawer out that I had some jewelry in, and he saw them.

Q. And you let him have a gold watch?

A. Yes.

Q. What did he say he wanted to do with it?

A. Show it to a lady friend.

Q. He brought that back, didn't he?

A. Yes.

Q. Did he get another watch?

(Testimony of James Hilton.)

A. No, he brought that back and showed it to me and put it in his pocket again and said he would pay me for it; he offered one to a gentleman there, but the gentleman would not accept it.

Q. This second watch he put in his pocket and said he would pay you for it?

A. That watch; yes.

Q. Didn't he offer you a hundred dollar bill at the time and you couldn't change it?

A. No, he never offered me a cent in money—he didn't.

Q. Did he, by virtue of his claiming to be a Secret Service officer, ever try to beat anybody in your place? A. Well, I don't know that.

Q. He always had money to spend?

A. Yes.

Q. Spent it freely? A. Yes.

Q. Isn't it a fact that it was a known fact in your place of business, a common every-day occurrence, that he was joking about these different things? A. No, not with me.

Q. Right there in your presence, before your bar-tender, didn't he tell you he was going to take a trip and was going to charter the steamer "Saratoga" and take a trip up to Nome or Alaska and had offered your boy a position? A. No.

Q. Don't you know that? A. No.

Q. Don't you know that he offered your boy a position one day at $5 and raised it to $10 the next day? A. No.

(Testimony of James Hilton.)

Q. And that he raised to $15 afterwards?

A. He raised Barnes from $10 to $20, I believe.

Q. Was he not going to make a balloon trip one day? A. No, I never heard of it.

Q. He would joke about these things, and then he would call you all up to have a drink over it, and he would go on talking about it?

A. No, no, not when I was there.

Q. Didn't he when he would get to talking this way, call you up to have a drink?

A. No, I don't know what he done when I wasn't there. He did frequently call people up to drink.

Q. Then he would tell you he would have to go down and see whether they were doing the work properly at the Federal Building, and then laugh and joke about it? A. No joking with me.

Q. Didn't you know that this man was only joshing?

A. No, I didn't. I certainly believed every word he said to me.

Q. Did you believe this balloon trip?

A. I never heard about it until now.

Q. Did you believe the trip to Nome with the steamer Saratoga?

A. I never heard of that, either.

Q. Wasn't there a Doctor Hayes—you know Doctor Dan Hayes, don't you? A. Yes.

Q. He was to be doctor of the expedition?

A. That I can't answer.

Q. You say he got some money changed and wanted fifty and hundred dollar bills?

(Testimony of James Hilton.)

A. Yes.

Q. What denomination was the other money that he wanted to change? A. In gold.

Q. In twenties and fives and tens?

A. I think nearly all twenties.

Q. He wanted bigger money to pay the men off?

A. He did at the time; yes, sir.

Q. Didn't you know that it was a joke—you didn't believe that, did you?

A. I tell you from the bottom of my heart, and I am on oath, as I sit in this court, I did believe it.

Q. Did you believe that to be so when he came to get these watches? A. At the time I did; yes.

Q. You believed he was going to buy them?

A. I supposed so.

Q. You knew that the Government was not going to buy them? A. I didn't know.

Q. That trip to Alaska, the Government didn't have anything to do with it, or the balloon trip?

A. I don't know; he never told me anything of that kind.

Q. He was around your place every day, wasn't he?

A. He would be gone several days and then he would come around again. He might have come around a few days—a few times, and I might not have seen him.

Q. He would be in your place more than half a dozen times a day, wouldn't he?

A. I don't know; I couldn't say.

(Testimony of James Hilton.)

Q. Didn't you tell me in your place of business that you were always there?

A. I was always there in the hours to be there.

Q. You told me you were there all day. Weren't you there all day?

A. No more than you can be in your office; no.

Q. Didn't you tell me then that Mr. Littell was around there all the time?

A. I had no right to tell you the truth in the place. I was not in the court and not under oath.

Q. You told me he was in there all the time and spent his money freely? A. Yes.

Q. Didn't you tell me in reference to this watch, that that had nothing to do with his being a Federal officer? A. No, I didn't.

Q. You didn't tell me that?

A. No, I didn't.

Q. You simply loaned him that? A. Yes.

Q. He could have got money out of you, too, couldn't he?

A. He could, on those grounds; he could have done it if he asked me for it.

Q. He never asked you for any?

A. No, he didn't.

Q. What was the agreed price that he was to pay for this watch?

A. I think, if I am not mistaken, I would not be sure, something like $30; I ain't positive.

Q. $30? A. I think something like that.

Q. Was it not $10?

(Testimony of James Hilton.)

A. No, I know it was about $30.

Q. Don't you know that he wanted to bargain with you for all the jewelry you had there in that place and that this watch was put in at $7 and if he took the watch singly it was to be $10 and he told you that he wanted it for a lady—it was a lady's watch, wasn't it?

A. Yes, a lady's gold hunting watch; I will tell you one thing, I can produce the agreement and the price of everything; Mr. Littell had a copy of it, too, he copied it.

Q. Was it not—whatever was said there in reference to his being Judge Advocate and holding a court-martial on Sunday and being the chief of the Secret Service and Paymaster on the Government Building—when he told you all this, you believed him, did you? A. Yes, I did.

Q. He was going to take a trip up on the Saratoga, and give your boy a job.

A. I don't know what job it was.

Q. He was going to employ all these men around your saloon?

A. I don't know that I believed that.

Q. You know about Doc Hayes. Isn't it a fact that the men used to joke him about it and he would answer back in a joking way?

A. I never heard that—supposed they were all square.

Q. Did he ever attempt to beat or defraud any one around there?

A. Not to my knowledge.

(Testimony of James Hilton.)

Redirect Examination.

(By Mr. HUTSON.)

Q. What was Littell's appearance as compared with the others that came in there?

A. More gentlemanly looking.

Q. Well-dressed man?

A. Well-dressed man and well behaved, a perfect gentleman in his deportment; he couldn't be nicer.

Q. What sort of a talker was he?

A. Very fine.

Q. When was counsel up to see you about this case?

A. I don't know that he came up purposely. I met him in the saloon. I was in there and he came in.

Q. You were a witness in this case before on the preliminary examination? A. Yes, sir.

Q. Did counsel come in immediately and talk to you about this case? A. Yes.

Q. Did he tell you who he was and that he represented the defendant?

A. He was introduced to me as Mr. Holzheimer. I asked him if he was a liquor dealer. I thought he was a liquor man; he looks like one.

Q. Did he tell you before he questioned you, that he represented the defendant in this case?

A. No, sir.

Q. Never told you anything about that?

A. Never told about that in any conversation.

(Testimony of James Hilton.)

Recross-examination.

(By Mr. HOLZHEIMER.)

Q. I was talking with your ex-bartender?

A. No, talking to Frank Bissel. I was talking about the Littell case.

Q. I never saw you before until I was introduced to you.

A. No, I thought you were a liquor man. I asked him if you were.

(Witness excused.)

Mr. HOLZHEIMER.—I desire to make a general objection to the entire testimony of this witness on the ground that it is incompetent and does not tend to prove any of the issues in this case, and move to strike it out.

The COURT.—The motion to strike out is denied. Exception allowed.

[Testimony of John Hilton.]

JOHN HILTON, a witness called and produced on behalf of the United States, having first been duly sworn, testified as follows:

Direct Examination.

(By Mr. HUTSON.)

Q. Where do you live?

A. At Port Angeles at present.

Q. What is your father's name?

A. James Hilton.

Q. Where were you during the months of May and June, 1907? A. I was in Seattle.

(Testimony of John Hilton.)

Q. Ever seen this gentleman before?

A. Yes, I have met him before.

Q. What name did you know him by?

A. Captain Littell.

Q. When, where and under what circumstances did you first meet him?

A. I met him in my father's barroom at the Barker Hotel. He was talking there and one day he asked me to go down to the waterfront with him to see a boat; he said there was some machinery down there stolen from the Government and he wanted to go down and get the numbers on it. There was a boat there all right, and the machinery on it; he took the numbers of the machinery.

Q. What conversation, if any, did you have with him en route down there and while you were there?

A. Nothing much; we just talked on the way there; when he saw this machinery, he said, "That is part of my business—Secret Service business."

Q. He made that statement to you?

A. Yes.

Q. You say he took down the numbers of the machinery?

A. I suppose he did; he took out a little notebook and pencil and wrote it down.

Q. Then what did you do?

A. We walked down the waterfront and he bought some cherries, and then we went from there downtown. He wanted to go and see a friend of his, a saloon-keeper, I think, from Detroit, down here

(Testimony of John Hilton.)

on Sixth and King, I think was the place. We went down there and had some drinks and stayed around there for a while and then we left and went up town again.

Q. Did you ever have any conversation with him in your father's place?

A. Yes, we talked there in the place; he was going to take several of us on a trip up to Alaska, on a pleasure trip.

Q. Did you ever hear any conversation there relative to the nature of his employment?

A. Only that he was in charge of the Federal Building here; he told us at the time that he went over there and ordered some defective stringer taken down and that he went over there to the building one day and found a big steel girder that was defective. He had that ordered taken down. He said "It takes a very nervey man to walk across them up in the air."

Q. When did he make that statement?

A. I don't know just the day, but in the barroom one morning when he came in.

Q. Did you ever hear him make any other representations as to his occupation?

A. No, only that he had been a captain in the army—captain of cavalry.

Cross-examination.

(By Mr. HOLZHEIMER.)

Q. When you went over to the Federal Building, how far were you from your father's saloon?

(Testimony of John Hilton.)

A. The Federal Building is on Third and Union. my father's saloon was in the Barker Hotel, on Pike Street, between Fifth and Sixth.

Q. Now, isn't it a fact that this morning he invited you all up to have a drink? A. Yes.

Q. Quite a crowd in there?

A. Yes, several in there.

Q. They all had a drink at Littell's expense?

A. Yes.

Q. You or some one else in the crowd in his presence, said, "Where are you going, Littell?" Do you remember that?

Q. And he answered back, "They ain't satisfying me with that building over there; I am going over there to tear it down and take out the stringer."

A. He didn't say anything about tearing it down to me; he said he had just ordered that out.

Q. In response to somebody asking where he was going, he made that remark and said he was going over there to change that and put in a new stringer. Isn't that the fact?

A. I don't know whether it is or not. I know that he said he ordered that taken out.

Q. Wasn't he laughing about it, and that was in response to somebody's asking him where he was going?

A. I don't know about that; he was always smiling when he was talking.

Q. Wasn't he always laughing and joking about you boys, if it was not one thing to-day, it was another thing to-morrow. It was never the same thing.

(Testimony of John Hilton.)

A. Really I thought that he was in charge of that building there, myself.

Q. He was going to take you on a trip to Nome, wasn't he?

A. No, we was going to southeastern Alaska.

Q. What boat had he chartered for that trip?

A. He hadn't chartered a boat, but he asked me which I thought was the best boat; I told him either the Dolphin or the Jefferson.

Q. How much wages was he going to give you?

A. Well, I was to go to work one day for him to help take another friend of his, a captain, down to the depot. I was to get $10 for that, but the captain died that night, and I couldn't get the job, of course, when the man died.

Q. What did he tell you the next day?

A. Captain Littell told me it was all up, the man died.

Q. Wasn't he going to increase your wages the next day? A. No, mine was not increased.

Q. Whose was increased?

A. Barnes was supposed to have his wages increased.

Q. Didn't you know it—you were there all this time, weren't you?

A. You see he talked to Barnes alone.

Q. You knew that he hired Barnes and raised his wages every other day, didn't you?

A. I only knew he raised it from $10 to $20 a day.

Q. Where were you to go?

(Testimony of John Hilton.)

A. To Southeastern Alaska; that was the trip we were going to take, just a pleasure trip. We were not to get paid for that.

Q. Then he would invite you all up to have a drink, wouldn't he? A. Yes.

Q. Did he ever tell you about taking a trip in a balloon?

A. No, I never heard anything about one.

Q. When somebody would ask you boys to buy a drink, he would turn around and laugh and say, "They aren't drawing their wages yet and they can't buy a drink?"

A. No, he didn't say that, not in my presence.

Q. What were you going to do with Doctor Sam Hayes?

A. We was going automobile riding when Hayes was around; the captain owned a White automobile; he was going riding in that. I didn't come around that day, I was late.

Q. You had been around every day and waiting for him? A. Oh, no.

Q. This whole gang waited for him there every day, didn't they?

A. Yes, I guess they waited for him until he came in there.

Q. He would come in there and buy a drink and begin talking with them?

A. He would come in there, yes.

Q. There was not a soul there that believed anything he said was there?

(Testimony of John Hilton.)

A. I think so; I started to get my things ready, I was going on that trip.

Q. That trip had nothing to do with the Government now, did it?

A. That trip didn't, I guess; you know they issue Government passes.

Q. Didn't he raise your wages? Weren't you first to get $5 and then to get $10?

A. No, not as I know of. I think I was to get $10.

Q. $10 was to be your wages? A. Yes.

Redirect Examination.

(By Mr. HUTSON.)

Q. You didn't make $10 for your wages, but you were to get $10.

A. Yes; you see I was to help take this Captain down to the train. He was sick and I was to help take him down.

Mr. HOLZHEIMER.—Q. Weren't you to get the wages on this trip north?

A. No, I was not to get any wages there; I don't think I was.

Q. These passes, was he to pass you, issue you Government passes?

A. He said Government tickets. He said the Government furnishes all these tickets.

Q. Did he talk seriously?

A. I thought he meant it all right. He was going to take Barnes down and get him some clothes because he didn't have clothes.

(Testimony of John Hilton.)

Q. This man Barnes, what employment was he going to have?

A. He was a sort of Secretary.

Q. To do what work?

A. He had Barnes figuring up the men's wages, and that kind of thing.

Q. On what?

A. What was to be paid out on this Federal Building.

Q. Did he have Barnes do that?

A. Barnes was there figuring it up, and seeing how much each was and all of them was to get.

At this point the Court adjourned the further hearing of this case until Tuesday next at 10 o'clock A. M.

[Testimony of Harry M. Moffett.]

HARRY M. MOFFETT, called and produced as a witness on behalf of the United States, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. HUTSON.)

The COURT.—State your full name.

A. Harry M. Moffett.

Q. Where do you live? A. In Oakland.

Q. What State? A. California.

Q. How long have you resided there?

A. All my life practically.

Q. What is your occupation?

A. I am in charge of the Secret Service, San Francisco district, operative in charge.

(Testimony of Harry M. Moffett.)

Q. How long have you been such?

A. I have been connected with the service since 1900, but I have been in charge since April this year.

Q. Did you ever see the defendant?

A. I have seen him; yes, sir.

Q. When and where and under what circumstances did you first see him?

A. I saw him on the 14th of April this year at the St. Marks Hotel, Oakland. I had a conversation with him. I had telegraphic instructions to arrest one George E. Lawson, thought to be living at the St. Marks Hotel, Oakland, and I went to that hotel and saw Mr. Littell there. I approached him and asked him if his name was George E. Littell. He said that it was not, that his name was Lawson. I asked him if he was connected with the United States Secret Service and he said he was not. I asked if he was ever in the city of Seattle and he said he was not. I told him then that I had these telegraphic instructions from Washington and wanted to detain him until I made further investigation; so he was very much surprised, said that his wife and daughter were in the lobby of the hotel and he wanted to talk with them. I permitted him to talk with them.

Q. Who, if anyone, was present?

A. Mr. Farrell was present with him.

Q. During all this time?

A. Yes, sir. Mr. Farrell is an agent in our service also. So after some conversation with his wife and daughter, or people he said were his wife and

(Testimony of Harry M. Moffett.)

daughter, I took him to the Alameda County jail and placed him in the jailer's living department until we made final investigation. But when we got there I told him he would have to submit to search, so I searched him there and found a loaded revolver on him, a morphine outfit and some papers. One paper I asked him particularly about, asked him who W. H. Littell was. He said, "That was my father." I said, "I thought you said your name was not Littell"? "Well," he said, "On account of certain business reverses I had in Detroit I assumed the name of Lawson and I have been going by that name ever since." He explained that he was treasurer and secretary of the United States Political Map Company, of Detroit, in the Chamber of Commerce building there. I asked him again if he had ever been in Seattle. He said yes, he was here a short while en route to Alaska.

Q. Did he say when?

A. He said about June, 1907. I said, "Why did you say that you were never in Alaska when I first asked you?" He said, "I believe I had a right to do that if I wanted to." I said, "What is your business?" He said, "I am a high-class grafter. I am an exploiter of big things, and I always get in touch with the millionaires and the big fellows." That was practicaly all that occurred on that day.

Q. You say you asked if he had ever been in the Secret Service?

A. Yes, sir, I asked him the fact about it, and he said he had never been in the Secret Service or any

(Testimony of Harry M. Moffett.)
other service of the Government. We went to the city afterwards and I searched his baggage, and we returned about midnight. He asked before I left if I would inform him of the charge that was to be put against him and I told him that I would; so the following morning I got information of this charge, Mrs. Dabney's charge, and I went to the jail that evening and told him that he was charged with defrauding Mrs. Dabney, giving her a fictitious draft. He said, "I know all about that." He said he would explain it, and said it was during 1907, June, 1907, that he was in Seattle, Washington, at the Lincoln Hotel in this city, and saw an ad. in the paper, one of the local papers here, which read a widow desires the acquaintance of a middle-aged man, socially inclined, object matrimony, or something to that effect, and for the sport of the thing he answered it and finally he received a letter from Mrs. Dabney asking him to call at her house. He said he did; made several calls after that; and finally she persuaded him to live at the house.

Q. That is his statement to you?

A. Yes, sir. He said he did so, and he stayed there for some little time. He said one day when going along the street while living at Mrs. Dabney's he was approached by a stranger who said, "Is your name Littell?" He said, "Yes." He said, "I want to tell you one thing; you had better leave Mrs. Dabney's house; if you do not somebody will hand it to you. That party is pretty close by now." So he re-

(Testimony of Harry M. Moffett.)

turned to Mrs. Dabney's house and told her what had just occurred. She told him to pay no attention, there was nothing to it. She said, "I intend to sell my lodging-house shortly and I would like to have you remain and see that the deal goes thru." He said he did and she sold it for $1,000.00 and he went with her to the bank where she deposited the $1000.00. He said, "By this time I became heartily sick of Mrs. Dabney. I had no intention of marrying her and would not marry her, but I happened to remark that I needed $600.00, that I was going to wire my father for $600.00 to pay on a tract of land outside of the City of Seattle, for sale for $1500.00," and he had $900.00 and, if he had $600.00 more, he would buy it and in a short time double his money; that he remarked to her that he thought he would wire his father for the $600.00. She said, "There is no need of that." She said, "You can have $600.00 or any part of the $1,000.00 that I deposited in the bank." He said, "All right, and I will give you a draft with the understanding that you do not present it without first notifying me." He said she gave him the $600.00 and he wanted to be in another deal and in a first-class hotel, so he went to the Savoy, and while in the barroom a man approached him and asked him his name; that the man drew a revolver on him and attempted to shoot him and he was disarmed or taken away by a party. He afterwards learned that the man was Dabney, Mrs. Dabney's husband. He said he became alarmed then and left Seattle and went directly to Denver and from Denver to Chicago;

(Testimony of Harry M. Moffett.)
from Chicago to Providence, Rhode Island, and won $1,200.00 gambling; then went to New York; then to England; then to France; said he won $2,600.00 at Monte Carlo; returned to New York in October, 1907; from that went to Florida, then to Cuba and then thru the cities in the Southern States and finally returned to Detroit, Michigan. He said when he returned there he found that Mrs. Dabney had been writing letters detrimental to his character in connection with a demand for the payment of this draft, and he wrote her that if she didn't retract things she had said about him in these letters he would never pay this draft; he said he had no intention until she made certain retractions. He said he then came from Michigan to Oakland, I think stopped at one or two places. He came to the Oakland hotel and was there up to the time of his arrest.

Q. All these conversations that you have related as between yourself and the defendant, was anyone present? A. Mr. Farrell was present.

Q. Were all these conversations made freely and voluntarily?

A. I told him the first night, I said, "Mr. Littell, you can talk or you can remain silent, but anything that you say may be used against you. Don't say anything unless you do so freely and voluntarily. You need not expect any hope of reward or money for your talking. If you talk, you must do so freely." He said he was perfectly willing to tell all he knew, he had nothing to hold back.

(Testimony of Harry M. Moffett.)

Q. Do you recall any further conversation or statements he made relative to why he went to the house of Mrs. Dabney?

A. Yes. I said, "Didn't you promise to marry this Mrs. Dabney?" He said, "No, I had no intention of marrying her at all. I went there, thought I would get some tail; that was what I was after, the tail end of it; but she had two very beautiful daughters and they seemed to be in the way all the time." I said, "You do not know anything bad about Mrs. Dabney, do you?" He said, "I consider her a good woman. As far as I know she is a good woman." He said he never accomplished his purpose, however.

Q. Do you know this defendant by any other name? A. Yes, sir, as George E. Leslie.

Cross-examination.

(By Mr. HOLZHEIMER.)

Q. When you searched Littell, the defendant here, did you find any mining stock on him—not mining stock but stock of the Political Map Company of which he was secretary?

A. I have no recollection of finding that; if there was anything of that kind, it is here or I returned it to him.

Q. To refresh your memory, was there anything of this kind, of the United States Political Map Company?

A. There might have been. I could not say positively as to that. I returned some stuff to him.

Q. I will ask if this will refresh your memory (shows witness papers)?

(Testimony of Harry M. Moffett.)

A. I do not remember seeing any such stuff on him at all.

Q. With "George E. Littell, Secretary"?

A. No, sir.

Q. You did not see that?

A. No, sir, I did not.

Q. When he was telling about his residence at Mrs. Dabney's, didn't he also tell you that just prior to his leaving the city he went to her, after he had moved to the Hotel Savoy, and asked her for the draft and she told him that it had been lost and could not find it?

A. No, sir; he made no such statement to me at all.

Q. He did tell you that she was to hold the draft until such time as he would tell her to present it?

A. He said he gave her that draft with the understanding that she should notify him before presenting it.

Q. Didn't he also state that instead of doing that she presented it to his father and that he never did refuse to pay it, that he had not been advised by his son?

A. No, he didn't tell me that at all.

Q. Had you ever seen this draft with that notation on it?

A. I saw it the other day for the first time.

Q. When you first saw it, it had that notation on that I called your attention to?

A. When I saw it two or three days ago; yes.

(Testimony of Harry M. Moffett.)

Q. To the effect that his son had not advised him?

A. Yes, sir.

Q. Did he tell you also that when it was presented for payment finally that it would be paid, but could not be on account of these reverses that he spoke about?

A. No, he didn't mention anything about the reverses.

Q. Did he mention to you then that he was on his way here with the expectation of getting this money?

A. No, sir.

Q. And settling the indebtedness?

A. No, sir. I asked him when he won the money in Providence why he didn't make good. I asked him several questions in that regard; why he didn't advise his father that the money was due this woman. He said that he had advised his father and he learned afterwards that his father was sick and had not been attending to business.

Q. Didn't he also tell you that on account of his reverses he took this name at San Francisco for the reason that he wanted time to get a hold of this money? A. No, sir.

Q. Are you positive of that?

A. I am satisfied he never made such a statement to me, no, sir. Which name do you have reference to, Lawson or Leslie?

Q. Lawson, of course.

A. No, he made no such statement to me.

Q. Didn't he say that she loaned the money to him? A. Yes, sir.

(Testimony of Harry M. Moffett.)

Q. And took the draft as security?

A. He gave her this draft, as I said before, with the understanding that she was not to present it until she notified him.

Q. Did he state the draft was what she wanted as a memorandum between them, as some security, some evidence of the indebtedness?

A. I do not know in those words; I just told you what he told me in regard to that.

Q. Didn't he tell you at that time in San Francisco that Mrs. Dabney drew out $1,000.00 and insisted first that he take the entire $1,000.00, but he only wanted $600.00 and would not take the $400.00?

A. No, sir, I do not remember that. My recollection is that he stated that he remarked to Mrs. Dabney that he was about to wire his father for $600.000 to make up the $1,500.00 to purchase the land, and she said there was no need to wire because she would let him have the $600.00. He said he didn't buy the land because some people had bought adjoining land and cut him out.

Q. And he didn't want the entire $1,000.00, but $600.00 was enough?

A. My recollection is that she did tell me that he could have the $600.00 or any part of the $1,000.00, but I do not think he said that she insisted on his taking the $1,000.00.

Q. He could have any part of it?

A. The $600.00 or any part of the $1,000.00.

(Testimony of Harry M. Moffett.)

Q. He said he only wanted $600.00 to keep the $400.00?

A. No, sir; he said he got $600.00 from her.

Redirect Examination.

(By Mr. HUTSON.)

Q. I do not remember whether in your direct examination, one of these places mentioned was Auckland or not?

A. He stated that he was about to go to Auckland, Australia, and would have been well on the way if it had not been for a little heart trouble that he had; that he intended to go just as soon as possible.

(Witness excused.)

[Testimony of William M. Farrell.]

WILLIAM M. FARRELL, called and produced as a witness on behalf of the United States, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. HUTSON.)

Q. Your name? A. Wm. M. Farrell.

Q. Your occupation?

A. Agent United States Secret Service.

Q. What place?

A. Los Angeles, California.

Q. Were you such during April of this year?

A. I was in San Francisco; this was in the month of April.

Q. Have you ever seen the defendant?

A. I have.

(Testimony of William M. Farrell.)

Q. When and where and under what circumstances did you first see him?

A. In the barroom of the St. Marks Hotel, at Oakland, California, on April 14th, at in the neighborhood of six P. M., and Mr. Moffett was present at the time, and we recognized Mr. Littell on my description of him. Mr. Moffett and I were sitting at a table to the side of the barroom and Moffett left his position and went to the bar and spoke to Mr. Littell, asked him if his name was George E. Lawson, and he stated that it was, and Mr. Moffett asked him—

Q. Was this in your presence and in your hearing?

A. In my presence and hearing; yes, sir. He said he would like to talk to him. Mr. Littell sat down alongside of myself and Moffett and asked him if his true name wasn't George E. Littell, and he stated that it was not. He asked him if he was not—was ever in the United States Secret Service and he said he was not or ever connected with any other Government position. He asked him if he ever was in Seattle. He denied that he ever was in Seattle.

Q. What, if anything, was done at that time by Mr. Moffett or yourself?

A. Mr. Moffett informed him that he had instructions to detain him for certain investigations, and he asked to see his wife and daughter, whom he stated was in the lobby of the hotel; so we took him from the barroom outside and he met his wife and

(Testimony of William M. Farrell.)

daughter, and we told him that we were going to take him for a while and learn further about him. So, after leaving the lady and the young girl that was with her, we took him to the residence of the jailor of the Alameda County jail, and there Mr. Littell admitted that his name was George E. Littell, and he stated the reason why he changed his name was that he was connected with the United States Political Map Company, of Detroit, Michigan; that that happened about four or five—five or six years ago, and that this company met with reverses, and that the name of Littell halted him wherever he went, and for that reason he changed his name to Lawson. He then admitted to us that he was in Seattle, Washington; that he stopped there for one week on his way to Alaska, but didn't go to Alaska. Then he admitted that he stopped at the Lincoln Hotel in Seattle; that he read a newspaper in which he saw a personal ad. stating that a lady would like to meet a man of refinement, of middle age, socially inclined, object matrimony; that in fun he answered this ad. and received a reply from Mrs. Dabney, asking him to call; that he called at her house on several occasions, and finally went there to live, took his abode there; said he stopped there I think about three months; said that one night on the street he was walking by a stranger, who told him if he didn't leave this house someone who was near to him would make it very disagreeable for him. He said he went then to Mrs. Dabney and told what the party informed him; that she said to never mind

(Testimony of William M. Farrell.)

that; that she was going to sell her boarding-house, and had an offer of $1,000.00, and she asked him to remain and help her thru with this deal, which he did; that he remained in the house and saw that the deal was properly made, and when she received the money he went with her to the bank, where she deposited it. He stated that he was sick of Mrs. Dabney and she bored him; that she was always broaching the matrimonial subject to him; that he left her house and went to the Savoy Hotel to stop; and he stated that one night in the Savoy Hotel a man approached him and threatened him, pulled a pistol on him, and somebody in the barroom took the pistol from this man; said he found out afterwards that this man was Mr. Dabney, the former husband of Mrs. Dabney. He then stated that he left Seattle and went to Denver.

Q. Just a minute. How were these conversations and statements made, voluntarily or otherwise?

A. They were all made voluntarily. Mr. Moffett cautioned Mr. Littell on his rights and told him if he made any statement it would be used against him, and if he had anything to say, it must be said voluntarily. He said he wanted to show us that he was right, that he had nothing to conceal; that he was innocent of any charge.

Q. When did you appraise him of the charge?

A. Sir?

Q. When did you appraise him of the charge? When did you notify him of what the charge was?

(Testimony of William M. Farrell.)

A. Mr. Moffett showed him a telegram that we had from our chief that George E. Littell—I do not remember the wording of the telegram.

Q. Which one of these conversations occurred after being notified of the Mrs. Dabney affair?

A. I didn't catch that.

Q. Which of the conversations that you have related occurred after the time he was notified that the charge against him was relative to Mrs. Dabney?

A. Mr. Moffett notified him in the saloon in the St. Marks Hotel in Oakland after we had met him and he admitted—and he stated his name was George E. Lawson, and we informed him again at the jail—informed him on several times. He was very free with his talk.

Q. Go ahead.

A. After leaving Denver, he stated he went to Chicago, and from Chicago to Providence, Rhode Island; he said he won $1,200.00 there gambling; that he left Providence and went to New York; from there he sailed to England, and from England he stated he went to France; he told us he won $2,600.00 at Monte Carlo. He said he left France and went back to England, and from England to New York; from New York to Cuba; from Cuba he went to Florida, and finally back up thru the Southern States to Detroit, Michigan, to his home; that he met his father, his father had informed him of some letter Mrs. Dabney wrote defamatory of his character. He told us then that he would not pay this

(Testimony of William M. Farrell.)

$600.00 or $500.00 that he borrowed from Mrs. Dabney until she took back these remarks that were made to his father regarding him. He also stated that after leaving Detroit, Michigan, he—I think he said he went to San Diego, California, and from there to Oakland.

Q. In any of these conversations, did he inform you of the nature of his business?

A. He told us first in the saloon that his business was that of a mining promoter, an exploiter of large investments. In the parlor of the jail, the Alameda County jail, he said his business was that of a grafter of the highest order; he said that he could pull the drawers off a millionaire without removing his pants.

Q. Did he state to you in any of these conversations any of his reasons for making the acquaintance of Mrs. Dabney?

A. He said that his object in going there was to —that he wanted a place of rest, a place that was quiet, and said that he had a purpose in going there, another purpose in going there, but on account of the presence of the two beautiful daughters of Mrs. Dabney he was unable to accomplish his purpose.

Q. Did he state what that was?

A. He said that he went there for the purpose of getting a piece of tail.

Q. How long have you been in the secret service?

A. Well, since 1905, January.

Q. What is the custom, if you know, of the Secret Service after hearing or interviewing anyone

(Testimony of William M. Farrell.)

with which they have communications to investigate? What do they do relative to the conversations?

Mr. HOLZHEIMER.—We object to that as immaterial.

The COURT.—The objection is sustained.

Cross-examination.

(By Mr. HOLZHEIMER.)

Q. He told you that in his mining enterprises he had been blown up and showed where the toes on both feet were off? In your examination did you see that?

A. He stated, I think it was in the State of Colorado, that he was interested in some mine and ordered a miner to fire off five charges there. They missed—they fired off six and—

Q. And the result is as you found there, that his toes are off on both feet?

A. Yes, sir. He said he stood over the blast and it tore the toes off his feet.

Q. And that was only a short time before?

A. I do not know about that.

Q. You do not know that to be a fact?

A. I saw his foot in the jail. It was healed up. It could not have been a short time before; it must have been over a year at least.

Q. You spoke of his wanting to talk to his wife and daughter; he didn't have any wife and daughter?

A. They turned out to be a Mrs. Gage and her daughter.

(Testimony of William M. Farrell.)

Q. It was not his wife and daughter?

A. Yes, sir.

Q. They never claimed to be his wife and daughter? A. She did so on the street.

Q. On the street? A. Yes, sir.

Q. Now, as to this proposition where you say that he was a man engaged in big enterprises—when he was telling you about what he had been doing with reference to mining properties and big enterprises, which you found was true, did you not?

A. Sir?

Q. Which you found was true, did you not?

A. Nothing more than what he said.

Q. And he also stated, did he, there that, while he would do that to this class of men in a business deal, that he was not doing that to poor women and children? Isn't that a fact, Mr. Farrell? That he had nothing to fear in this transaction?

A. I didn't quite understand you.

Q. Read the question. (Question read.)

A. He didn't mention anything about women and children.

Q. Sir?

A. He didn't say anything about women and children to us.

Q. Didn't the question of grafter come out because you were special officers there and asked wasn't he a grafter in the examination of him?

A. No, sir.

Q. And he answered him and said he was a promoter engaged in big deals, and he might take the drawers off without their pants of a millionaire?

(Testimony of William M. Farrell.)

A. No, sir; it was at two different times.

Q. I understand that. Was not it brought out because you officers insisted he was a grafter?

A. No, sir; we had but very little to say to him. He was willing to put himself right to us. He was willing to talk and we listened to him.

Q. After he found you gentlemen were officers and had a right to talk to him, he admitted his name, didn't he?

A. He admitted his name on a note that Mr. Moffett read, stating that in case of his death or in case of accident, or in case of accident or death to please notify W. H. Littell.

Q. Was that his father?

A. Yes, sir; then he admitted he was George E. Littell.

Q. That is when he found out that you were officers?

A. He found out that we were officers in the bar-room of the St. Marks Hotel.

Q. It was only what you had said about it?

A. Mr. Moffett informed him that he was an agent of the United States Secret Service and introduced me as an agent of the United States Secret Service.

Q. That is what you said about it?

A. He knew we were officers when we first had him in the St. Marks Hotel.

Q. Was that because you said so?

A. Because I said so.

Q. Because you gentlemen said so?

(Testimony of Charles Crawford.)

A. I didn't quite understand the question.

Q. You testified in the lower court, didn't you, in the preliminary hearing?

A. Yes; sir.

(Witness excused.)

[Testimony of Charles Crawford.]

CHARLES CRAWFORD, recalled for further examination on behalf of the United States, testified as follows:

Direct Examination.

(By Mr. HUTSON.)

Q. At any time while you resided at Mrs. Dabney's boarding-house during the month of May or June, 1907, did you have occasion to pass thru the hall from the room of Mr. Littell and see any of his belongings?

A. He kept a little trunk in the hall and I was passing thru and I asked him what he had there and he said Government papers.

Q. That was the answer he made?

A. Yes, sir.

Q. He used the words "Government papers"?

A. Yes, sir.

Cross-examination.

(By Mr. HOLZHEIMER.)

Q. Do you remember your testifying in Oakland? A. I could not say that I do.

Q. Were you down there and testified in the preliminary hearing? A. In San Francisco?

Q. You testified there?

(Testimony of Charles Crawford.)

A. Yes, sir.

Q. Did you say anything about this there?

A. I think so; yes, sir.

Q. When you came back from there—do you know where the Barker Hotel bar is?

A. Yes, sir.

Q. You frequently go there?

A. No, sir; I do not drink.

Q. Within a few days' time after you came back, do you remember being there and talking to Eugene Randolph, one of the proprietors of the place?

A. Mr. Hilton owned it the last I was there.

Q. He might have been the bartender for Mr. Hilton at that time, Eugene Randolph?

A. Yes, sir.

Q. Do you remember talking about the case?

A. Yes, sir.

Q. And said, you bet he would be sent for ten years?

A. No, sir; this fellow said they had no case against him and could not convict him, and I said I didn't see how a man could act as dirty as he acted and possibly get away. That is what I told him. He said they would not convict him and I offered to bet that they would convict him. I said, "I cannot certainly see how a man could act as dirty as he acted—"

Q. Wanted to bet $500?

A. Yes, sir; but I did not want to permit that. Some attorney said that it was impossible to convict him, for he would get away on some technicality.

(Testimony of Charles Crawford.)

Q. You have no interest in making your testimony? A. No, sir.

Q. You and Mr. Littell had trouble before you left, didn't you? A. With who?

Q. With Littell? A. Before he left?

Q. Yes. A. No, sir.

Q. You didn't have trouble with him?

A. No, sir.

Q. And not at outs with him?

A. No, sir—that depends on what you call trouble.

Q. You say you are on friendly terms with him?

A. I never was on friendly terms with him; no.

Q. Were you friendly to him?

A. I bid him the time of day and such as that. I never got close or intimate with him. I think, as I told you the other day—

Q. You got pretty intimate with him when you wanted some work done with reference to your child?

Mr. HUTSON.—I would like to have them explain what they offer to try and prove by these questions. I object to any reference to any children of this witness.

Mr. HOLZHEIMER.—I want to show that they were intimate and had a quarrel.

The WITNESS.—No, sir, he first hung about me and there was no chance for me to evade him, that is why; I can tell what.

(Testimony of Charles Crawford.)

Redirect Examination.

(By Mr. HUTSON.)

Q. You didn't have any trouble with him?

A. No, sir, not a word outside of the courtroom in San Francisco.

Q. You say outside of the courtroom in San Francisco?

A. Yes, sir, that is all. I never had another word with him.

(Witness excused.)

[Statements of Counsel Relative to Case, Further Testimony, etc.]

Mr. HUTSON.—With the exception of one witness, that will close the Government's case. This Mr. Kirk's subpoena was left at his house last week with his wife. She said he was in the hospital and I telephoned the doctor this morning and he said he left the hospital last Saturday.

Mr. HOLZHEIMER.—We have no objection, because I would like to recall Mrs. Dabney for further cross-examination.

Mr. HUTSON.—We have no objection, except we were thru with the witness and they were thru, and I think the testimony is thru as far as she is concerned.

The COURT.—The Court will accommodate you if it is of any importance, but if you just want to quiz her and cross-examine again to a long extent, I do not feel inclined to do so. Is there anything important that you want to find out?

Mr. HOLZHEIMER.—In our judgment it is.

The COURT.—Please tell what it is.

Mr. HOLZHEIMER.—I want to show a document to her, show her the papers that she claims to have seen relative to the question of the defendant being a United States officer and present to her, and also the United States Political Map and the stock certificates and many other things. I didn't have them here Friday, but I have them here now. We have what she claims this man showed to her as a United States officer. We have that here, and have the stock certificates that she claimed looked like money, and I have the map.

The COURT.—That is all a matter for you to show by your own witnesses. I will not reopen the case for that.

Mr. HOLZHEIMER.—We except. Exception allowed.

Mr. HUTSON.—Mr. Kirk will corroborate different representations of the defendant as claimed by the Government and we want him here, and yet we are not sure that we can secure him.

The COURT.—I do not quite understand what you would prove by him.

Mr. HUTSON.—We desire to prove by him that he had seen the defendant over a year ago and met him here in June, 1907, and addressed him as Captain Littell and asked him what he was doing, and he told him he had just come here from one of the Southern States and was in charge of a number of men in the federal building. It is corroborative to that extent.

The COURT.—I do not think we ought to consume time with cumulative matter.

Mr. HUTSON.—He also stated that he knew him a year ago when he was making similar representations in Saint Paul.

The COURT.—That is not of sufficient importance.

Mr. HUTSON.—The case is closed.

Mr. HOLZHEIMER.—At this time we desire to make a motion, if the jury will be excluded.

The COURT.—That is not the practice, to exclude the jury.

Mr. HOLZHEIMER.—Shall I go ahead now?

The COURT.—Yes, sir. The jury may be at ease when this motion is being presented. You can remain in your seats, if you wish to, or step out within call.

[Motion for Dismissal of Action, etc.]

Mr. HOLZHEIMER.—May it please the Court, we desire at this time in behalf of the defendant to move for a dismissal of the action. We believe that under the statute by virtue of which this defendant is brought into court and under the law as laid down and adjudicated by the United States Courts, that the prosecution in this case have not shown the crime under the statute sufficient to have it presented to the jury to tell whether or not, or what were the moving causes which induced the prosecuting witness to part with her money.

(Argument.)

The COURT.—I will let the jury decide the case and, if necessary, I may consider this matter again on a motion in arrest of judgment.

The trial will be proceeded with at two o'clock this afternoon. Gentlemen of the jury, you will observe the instructions I have heretofore given you. The Court is in recess until two o'clock.

Mr. HOLZHEIMER.—We except.

(At this time an adjournment was taken to the hour of 2 o'clock P. M., at which time the case was resumed as follows:)

The COURT.—One of the authorities that was read me this forenoon as to the statement of the law that an indictment which follows the words of the statute and specified the act is a good indictment—this fifth count follows the words of the statute, but specified no act, and I do not think that a conviction could be sustained under the fifth count, and I will instruct the jury to disregard it.

Mr. HOLZHEIMER.—At this time, we rest.

Testimony closed.

Charge of the Court.

Gentlemen of the Jury: The statute of the United States under which this defendant stands charged upon five counts in the indictment reads as follows:

"That every person who, with intent to defraud either the United States or any person, falsely assumes or pretends to be an officer or employee acting under the authority of the United States, or any department or any officer of the government thereof, and who shall take upon himself to act as such or who

shall in such pretended character demand or obtain from any person or from the United States, or any department or any officer of the government thereof, any money or property, shall be deemed guilty of felony."

This statute comprehends all of the different means and methods by which frauds may be perpetrated under the guise of an official character and authority of the United States as an officer. One of the species of fraud that is punishable under this statute is where a person who is not an officer assumes to be such for the purpose of enforcing any claim which the government may have, or any pretended claim which he assumes to assert in behalf of the government. But the elements of this offense are more comprehensive and do not limit the wrongful act to such extracting money or property from another under the guise and asserting a claim of the United States which it is the duty of an officer in his official character to assert, but includes the holding of one out as such officer or employee for the purpose, among other things, to give him such a credit or standing as will enable him to successfully obtain money from another for his own private use and benefit and with intention to defraud.

The fifth and last count in the indictment is withdrawn from your consideration for the reason that it is too general in its statements and does not tender an issue as to any particular fact or act by which the offense could have been committed.

The first four counts of the indictment charge the defendant with offenses, all of which are of like

character, being that he, the said defendant, knowingly and feloniously and with the intention to defraud one Mrs. Josephine C. Dabney, feloniously assumed and pretended to be an officer and employee acting under the authority of the United States and of the Treasury Department thereof, to wit, an officer of the United States Secret Service, and in such pretended character and as such officer and employee, did unlawfully, knowingly and feloniously demand and obtain from the said Mrs. Josephine C. Dabney the following property and articles of value, to wit, in the first count stated in said indictment board and lodging of the value of thirty dollars; in the second count of the indictment of obtaining two dollars lawful money of the United States; in the third count of the indictment of obtaining the sum of five dollars lawful money of the United States; in the fourth count of the indictment with the obtaining of six hundred dollars, lawful money of the United States.

Before you can convict the defendant upon either one or all of the first four counts in the indictment, you must find, first, that the defendant assumed to be an officer or employee of the Government, the kind of an officer that is specified in the indictment, that is, an officer in the Secret Service; second, that such assumption was false; third, that the false assumption was made with the intent to defraud the said Mrs. Josephine C. Dabney; fourth, that the defendant did in his assumed character, and because of his false assumption, defraud the said Mrs. Josephine

C. Dabney of the property or money described in the indictment.

The evidence must be sufficient to convince you beyond a reasonable doubt so that you can find these four elements of the offense proved, that he assumed to be an officer in the Secret Service, that he was not such an officer, that he intended to defraud, and that he was successful in actually accomplishing the fraudulent intent. If any one of these elements is not proved by the evidence, your verdict will be that the defendant is not guilty.

If you find from the testimony that, even tho the defendant did falsely assume or pretend to be an officer or empolyee of the Government of the United States and so represented himself to the said Mrs. Josephine C. Dabney, the fact that she had advertised for a husband and that in pursuance of such advertisement the defendant came to her house and there lived and boarded with her, and that an engagement to become married was contracted between them and that the expected marriage was the controlling inducement for the said Mrs. Josephine C. Dabney to part with her property or money, then you will find the defendant not guilty.

If you find from the evidence that the defendant was engaged to be married to the prosecuting witness, Mrs. Josephine C. Dabney, and that the said defendant after said engagement asked the said Josephine C. Dabney for the loan of said six hundred dollars to be used by him in some business enterprise, and that she stated that she didn't like to

loan so much money without security, upon which the defendant told her that he would give her a draft on his father in Detroit, Michigan, which could be cashed by her when she went East, and that the said Josephine C. Dabney took said draft as security, and loaned the defendant the six hundred dollars in question, you will find the defendant not guilty under the fourth count in the indictment; that is, you will have to acquit him under that one count if this money was loaned on security and not on mere confidence in him in his official capacity.

I further charge you that false representations as to the personation of an officer or employee of the United States, no matter how false, must necessarily be one which would be calculated to deceive, so that by means of such deception the defendant would obtain something of value. In other words, it must be such a personation as would be calculated to deceive, having in view the intelligence and understanding and means of knowing as the parties would have who were engaged in such a transaction, and in this case it must have been calculated to deceive a person with the understanding and intelligence that the said Josephine C. Dabney appears to be possessed of from her testimony, her station in life, her age and surroundings and appearance on the witness-stand. So, if the false personation was frivolous and meaningless and not such as would be calculated to deceive one of the understanding and intelligence of the prosecuting witness, Mrs. Josephine C. Dabney, and she, the said Mrs. Josephine C. Dabney, had the means of detection at hand for

ascertaining the truth or falsity of the assumption by the defendant as to his occupation, then she cannot be said to be deceived by it to her injury, and it is not, therefore, a false personation by means of which property is obtained, and would not come within the statute.

The theory of the prosecution is that the defendant successfully prosecuted a design to commit a fraud by pretending to be an officer so as to establish a credit and to win the confidence of Mrs. Dabney. Now, if in addition to obtaining board and lodging without paying for it and obtaining money at different times upon the credit which his pretended United States official character gave him, he so far won her confidence that he obtained from her a promise of marriage, and that in the hope of marriage she was influenced in letting him have her money, the fact that the expected marriage had an influence upon her would not within the instructions as given here be a defense in the case, that is, it would not detract from the false pretense because he had won her confidence so far; the real question in the case is whether or not the false pretense was the controlling influence by which he obtained the money and the board and lodging.

This is a criminal case, and it devolves upon the Government to overcome the legal presumption of innocence by evidence of a convincing character, positive and convincing, so as to overcome that legal presumption to the extent that convinces the jury beyond a reasonable doubt that the defendant is guilty; a mere probability is not sufficient, a mere

preponderance of the evidence is not sufficient; every reasonable doubt must be overcome by the evidence to justify a conviction. This is a positive rule of the law and is to be observed by the jury in deciding a criminal case.

A reasonable doubt within this rule of law is what the two words coupled together signify, an actual doubt of which the jury feel conscious after having given the testimony in its entirety, and every part of it, a candid consideration, and such a doubt as would have an effect and influence in a matter of like importance in your own affairs, such a doubt as would deter a reasonable person from assuming a fact that was left thus in doubt.

You are to try the case from the consideration of the testimony admitted on the trial, uninfluenced by any surmises or inferences from arguments or legal questions, and without being influenced by any presumption of facts not proven by convincing evidence. Decide the case according to the testimony given by the witnesses on the witness-stand.

There has been some contention in the argument of the case between counsel as to what testimony was given. The best that can be done in a case of that kind is to leave the jury to determine, and you have to do the best you can according to your own recollection of what testimony was given.

A defendant on trial accused with crime is authorized by law to be a witness in his own behalf. That is a privilege, it is not an obligation. The law will not compel a man on trial to be a witness in his own case. If he refrains from offering himself as a wit-

ness, he merely exercises a legal right, and the jury have no right to draw any inferences prejudicial to him by the fact that he did not testify in his own case.

It requires a unanimous concurrence of the jury to find a defendant guilty or to find him not guilty. You will have to come to a unanimous agreement in order to return a verdict.

I submit three forms of verdict. You are authorized to return a general verdict. If the defendant is not found guilty upon one of the first four counts of the indictment, your verdict will be that you find the defendant not guilty. If you find him guilty of either one or all of the charges contained in the first four counts of the indictment, you will return a verdict that you find the defendant guilty as charged in the indictment.

The jury will retire.

[Defendant's Exceptions to Portion of Charge of the Court to the Jury.]

Before the jury retired, the counsel for defendant excepted in writing to the following portions of the Court's charge to the jury, which said exceptions were duly taken before the verdict.

1.

To that portion of the Court's charge to the jury which reads as follows:

The theory of the prosecution is that the defendant successfully prosecuted a design to commit a fraud by pretending to be an officer, so as to establish a credit and to win the confidence of Mrs. Dabney. Now, if in addition to obtaining board and

lodging without paying for it and obtaining money at different times upon the credit of his pretended a United States official character, he so far won her confidence that he obtained from her a promise of marriage, and that in hope of marriage, she was influenced in letting him have her money, the fact that the expected marriage had an influence upon her would not within the instructions as given, be a defense to the case, that is, it would not detract from the false pretenses because he had won her confidence so far; the real question in the case is whether or not the false pretense was the controlling influence by which he obtained the money and the board and lodging.

2.

To that portion of the Court's charge which reads as follows: I submit three forms of verdict. You are authorized to return a general verdict. If the defendant is not found guilty upon one of the first four counts of the indictment, your verdict will be that you find the defendant not guilty; if you find him guilty on either one or all of the charges contained in the first four counts of indictment, you will return a verdict that you found the defendant guilty as charged in the indictment.

The above two exceptions were duly allowed by the Court.

[Recitals Relative to Additional Instructions of the Court to the Jury, etc.]

Thereupon the jury impaneled in said cause retired for deliberation upon the matters and things submitted to them.

The jury impaneled in this cause after deliberating for a time, returned into court for additional instructions, and thereupon the Court delivered the following additional instructions. I have received from the jury a slip of paper containing the following request: "The jury desires to be informed as to the meaning of the words 'demand and obtain' as used in the indictment."

In answer to this, the Court informs you that the word "demand" has the same meaning as peremptory request and it implies an assertion of a claim founded upon a legal obligation.

The word "obtain" means to get possession of, or to acquire and retain.

The phrase "demand and obtain" needs further explanation. In the section of the law which I read to you, the words "demand" and "obtain" are separated by the word "or." I will read the section to you again.

"That every person who, with intent to defraud either the United States or any person, falsely assumes or pretends to be an officer or employee acting under the authority of the United States, or any department, or any officer of the Government thereof, and who shall take upon himself to act as such, or who shall in such pretended character demand or obtain from any person or from the United States, or any department, or any officer of the Government, thereof, and money, paper, document, or other valuable thing, shall be deemed guilty of felony."

By use of the disjunctive conjunction, the law is made to comprehend either or both of the matters

which the words signify, but in framing the indictment, the conjunction "and" had to be used, otherwise the indictment would not be a positive accusation, for to say that, a person did "demand or obtain" would fail to specify an act with the certainty required in criminal pleading.

The Government, however, is not required to prove both a demand and success in its enforcement, or compliance. The charge is sustained if the proof is sufficient to establish that the defendant did make an unlawful demand while pretending to exercise the authority of an officer of the United States, or that without having made any demand, he did, under pretended authority as an officer of the United States, get possession of and retain any property or thing of value specified, in the indictment.

To the giving of said additional instructions, the defendant by his attorneys at the time excepted and his exception was allowed by the Court.

C. H. HANFORD,

Judge.

Thereupon the jury again retired, and after consideration, brought into court on the 21st day of July, 1908, a verdict finding the defendant guilty as charged in the indictment.

[Motion for New Trial (in Bill of Exceptions).]

Thereupon on the 24th day of July, 1908, the defendant moved for a new trial for the following reasons:

1.

For refusal to grant defendant's motion to dis-

miss said action at the close of the testimony on the part of the United States.

2.

Insufficiency of evidence to sustain either of the counts stated in the indictment.

3.

Insufficiency of evidence to sustain the verdict.

4.

Errors of law occurring at the trial of said action, to which errors the defendant excepted at the time, complete record of said errors with exceptions thereto have been preserved in the stenographer's notes of the trial, to which defendant hereby refers for a complete statement and enumeration thereof.

The above motion for a new trial was on the 8th day of August, 1908, overruled, to which ruling the defendant excepted, which exception was duly allowed by the Court.

[Recitals Relative to Motion in Arrest of Judgment, etc.]

At the time defendant's motion for a new trial was filed, to wit, on the 24th day of July, 1908, the defendant also made a motion in arrest of judgment, which said motion was argued and submitted on the 24th day of July, 1908, and was made on the following grounds, to wit:

That the facts stated in each and every count in said indictment would not constitute an offense against the laws and statutes of the United States.

The above motion in arrest of judgment was overruled by the Court 8th day of August, 1908, to which

ruling the defendant excepted, and which exception was duly allowed.

Thereafter the Court pronounced sentence upon the defendant and now in the furtherance of justice and that right may be done, the defendant prays the foregoing as his bill of exceptions in this case, and prays that the same may be settled and allowed and signed and certified by the Judge as provided by law.

Dated this 11th day of September, 1908.

By HOLZHEIMER & HOLZHEIMER,
Attorneys for Defendant, 537 Burke Bldg., Seattle, Washington.

[Order Settling and Allowing Bill of Exceptions.]

Settled and allowed this 8th day of October, 1908.

C. H. HANFORD,
Judge.

[Endorsed]: Defendant's Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington. Sept. 14, 1908. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

Settled and filed in the U. S. District Court, Western Dist. of Washington. Oct. 8, 1908. R. M. Hopkins, Clerk. W. D. Covington, Deputy.

In the United States District Court for the Western District of Washington.

No. 3709.

THE UNITED STATES

vs.

GEORGE E. LITTELL.

Petition for Writ of Error [and Order Thereon].

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

The above-named defendant by his attorneys, Holzheimer & Holzheimer, complained that in the record and proceedings in the trial, verdict and in the judgment and sentence rendered against the said defendant in this action by the United States District Court for the District of Washington, Northern Division, manifest error hath happened to the great damage of the said defendant, and he respectfully prays that an appeal of his said cause be held and that a writ of error be issued to correct the said errors complained of and to reverse and annul the said judgment and sentence against the defendant.

Your petitioner respectfully states that he has this day filed his assignments of error committed by the Court in said cause and intended to be used by

your petitioner as plaintiff in error in the prosecution of this suit in error against the United States.

Dated this 8th day of October, 1908.

GEORGE E. LITTELL,
Defendant and Plaintiff in Error.

By HOLZHEIMER & HOLZHEIMER,
Attorneys for Defendant and Plaintiff in Error, 537 Burke Bldg., Seattle, Wash.

Received a copy of the above petition this 8th day of October, 1908.

CHARLES T. HUTSON,
Asst. U. S. Attorney.

Order.

The foregoing petition of appeal is granted and the claim of appeal therein made is allowed. Let a writ of error be issued as prayed for in said petition.

Dated this 8th day of October, 1908.

C. H. HANFORD,
United States District Judge for the Northern Division, District of Washington and Presiding in Said Circuit.

[Endorsed]: Petition for Writ of Error. Filed in the U. S. District Court, Western District of Washington. Oct. 8, 1908. R. M. Hopkins, Clerk. W. D. Covington, Deputy.

In the United States District Court for the Western District of Washington.

No. 3709.

THE UNITED STATES
vs.
GEORGE E. LITTELL.

Assignment of Errors.

The above-named defendant by his attorneys, Holzheimer & Holzheimer, alleges that in the record and proceedings in this court in the above-entitled cause there is manifest error in this, to wit:

The Court erred:

I.

In overruling defendant's objections to the following question propounded by counsel for the prosecution to the witness, Josephine Dabney, and in refusing to strike out the answer of said witness:

Q. Was this room so situated in the house that it was necessary for anyone to pass through it to get into the other rooms? A. His room?

Q. Yes.

A. Yes, parties would have to pass through, in fact, I would really have to go through that room myself to get to the front door or to Mr. and Mrs. Crawford's room. I had the privilege of going through that room when I rented it. He wanted to know what roomers would come through that room. I said the doctor and his wife. He said, "I can put up with that, if they can." I said I would speak to them about it. He said, "I have burglar alarms which I always put on anyway; I always put one on the window and one on the door," which he did.

II.

In overruling the defendant's objection to the following question propounded by counsel for the pros-

ecution to the witness, Josephine Dabney, and in refusing to strike out the answer of the said witness:

Q. Did you at any other time see any other papers or matters in his room?

A. At one time I was in the room—he said he was going to town and I supposed he had gone, and I went in there and he was there, and he had his satchel there. He was very systematic in his habits, and very particular, and he seemed to be fixing something in the satchel, and on the table and on the chair he had something that appeared to be about that length and that width. (Indicating.)

The WITNESS.—(Resuming.) That looked like money.

Q. What did it look like?

A. It looked like money.

The WITNESS.—(Resuming.) It looked like money—like plates of some kind.

Q. Like paper money?

A. Yes, like paper money, a package that looked like money.

The WITNESS.—(Resuming.) He said that was some work that he had done in the United States Secret Service. That was the answer he made, and he picked it up and put it in his satchel.

III.

In overruling defendant's motion to strike out the following answers of the witness, Josephine Dabney:

A. No, he didn't pay me. He never paid me or anything about it only one day. I didn't ask him as I would other roomers because I thought a man

that was working in that kind of business, I could have the money at any time, and I wanted to get some dental work done.

The WITNESS.—(Resuming.) I thought I could have it all at one time and it didn't make any difference to me. Of course, I trusted him under those circumstances.

IV.

In permitting the witness, Josephine Dabney, to answer the following questions propounded by counsel for the prosecution:

Q. You saw him have this $20.00 gold piece, did you? A. Yes, I saw him have that.

Q. Under what belief did you loan him this money.

The WITNESS.—(Resuming.) From his being a United States Secret Service man. I trusted him, of course, because all the rest of my roomers always paid me in advance, and I supposed that I could get that from him at any time when I wanted, to get my teeth fixed and that was the reason I didn't ask him for it before. He was down there to the dentist and made a date at the same time that I was there. He had a tooth filled. I went and had my teeth fixed as per agreement. I am kind of ahead of time. He said that he would send me the money. He was called away; went to North Yakima. He came up one day and said Captain Hancock is going to relieve me of my duties in the secret service, he was going to relieve me, he said—he said Captain Hancock was out riding in an automobile and met with an accident

and got his leg broke, and he said, "I will have to resume my duties until someone comes to relieve me." His excuse was to me that he was going to North Yakima to pay off men in the United States Secret Service. I spoke to him about the accident. I said, "It will be in the paper." He said, "Oh, no, it will not be in the paper, because Captain Hancock's wife is not very strong and he did not want his family to hear of it, and he paid the editors to keep it out of the papers for their benefit."

V.

In denying defendant's motion to strike out the following testimony given by the witness, Josephine Dabney:

Q. You let him have the $600.00, did you, and took the draft? A. I did.

Q. On what belief or what representation did you permit him to get that money?

A. On account of his claiming to be an officer of the United States Secret Service, doing the work that he was doing. I supposed he was prominent, that there was no man that could hold that office without money.

VI.

In overruling defendant's motion to strike from the record the following testimony, given by the witness, Josephine Dabney:

Q. Did you ever see these? A. Yes.

Q. What are they?

A. Burglar alarms such as he used while there in my house, and the way he used them, he put those

two prongs at the bottom, and when anyone would push on the window or door at once it would ring.

VII.

In permitting the counsel for the Government to produce as evidence in the case the burglar alarms testified to over the objection of the defendant.

VIII.

In overruling defendant's motion to strike out the following answer of the witness, Josephine Dabney:

A. I didn't talk with anyone only just Mr. Crawford. I said it didn't seem to me that a man had a right to come in and represent himself as a United States Secret Service man, and he did that for the purpose of robbing me.

IX.

In overruling defendant's motion to strike out the following testimony of the witness, Charles Crawford:

A. He had a hypodermic outfit.

Q. He had? A. Yes.

Q. Do you know what sort of an outfit it was?

A. Yes.

Q. Have you seen many such yourself?

A. Several; yes.

Q. What was it?

A. A little thing, with a needle—a sort of a syringe with a needle.

Q. Did you ever see him use it?

A. I do not think I did. I have seen him load it several times.

Q. What did you see about his person? Ever see anything when he was in there?

A. One day when I came home, I was up at the store working and didn't get through until very late and I went in the bath-room and he came in there in his night-robe and he had a gun under the robe.

Q. What kind of a gun? A. A revolver.

Q. Where?

A. He had his hand like that. (Indicating in his breast.)

X.

In denying to the defendant the right to recall the witness, Josephine Dabney, for further cross-examination.

XI.

In overruling defendant's motion to dismiss the action as against the defendant at the close of the prosecution's testimony.

XII.

In charging the jury as follows:

The theory of the prosecution is that the defendant successfully prosecuted a design to commit a fraud by pretending to be an officer, so as to establish a credit and to win the confidence of Mrs. Dabney. Now, as in addition to obtaining board and lodging without paying for it and obtaining money at different times upon the credit of his pretending a United States official's character, he so far won her confidence that he obtained from her a promise of marriage, and that in hope of marriage; she was influenced in letting him have her money. The fact that the expected marriage had an influence upon her would not within the instructions as given, be a de-

fense to the case, that is, it would not detract from the false pretenses because he had won her confidence so far; the real question in the case is whether or not the false pretense was the controlling influence by which he obtained the money and the board and lodging.

XIII.

In charging the jury as follows:

I submit three forms of verdict. You are authorized to return a general verdict. If the defendant is not found guilty upon one of the first four counts for indictment, your verdict will be that you find the defendant not guilty; if you find him guilty on either one or all of the charges contained in the first four counts of indictment, you will return a verdict that you found the defendant guilty as charged in the indictment.

XIV.

In overruling defendant's motion for a new trial.

XV.

In overruling defendant's motion to arrest the judgment and sentence in the action.

XVI.

In passing sentence and judgment on the said defendant.

Wherefore, the above-named defendant by his attorneys, Holzheimer & Holzheimer, prays the foregoing assignment of errors to be entered upon the record of this cause, and therefore prays that upon the hearing of this appeal, the judgment and sentence

in the cause be in all things revised, annulled and set aside, and that he, the said defendant, be discharged.

Dated this 8th day of October, 1908.

GEORGE E. LITTELL,
Defendant and Plaintiff in Error.

By HOLZHEIMER & HOLZHEIMER,
Attorneys for Defendant and Plaintiff in Error, 537 Burke Bldg., Seattle, Wash.

Received a copy of the above assignment of error this 7th day of October, 1908.

CHARLES T. HUTSON,
Asst. U. S. Attorney.

[Endorsed]: Assignment of Errors. Filed in the U. S. District Court, Western District of Washington. October 8, 1908. R. M. Hopkins, Clerk. W. D. Covington, Deputy.

Writ of Error [Copy].

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Honorable the Judge of the District Court of the United States, for the District of Washington, Northern Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment and sentence of a plea which is in the said District Court before you, between George E. Littell, plaintiff in error, and the United States, defendant in error, manifest error hath happened to the great damage of the said George E. Littell, plaintiff in error, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid, in this behalf, do command you, if judgment and sentence be therein given, that then under your seal, distinctly and openly, you send the records and procedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit together with this writ, so that you have the same at the city of San Francisco in the State of California on the 7th day of November, next, in said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, the 8th day of October, in the year of our Lord one thousand nine hundred and eight.

[Seal] R. M. HOPKINS,

Clerk of the United States District Court for the District of Washington.

Allowed by:

District Judge of the United States District Court, Northern Division, District of Washington, Presiding in said Circuit.

C. H. HANFORD,

Judge.

Received a copy of the above Writ of Error this 7th day of October, 1908.

[Seal] CHARLES T. HUTSON,
Asst. U. S. Attorney.

[Endorsed]: Writ of Error. Filed in the U. S. District Court, Western District of Washington. Oct. 8, 1908. R. M. Hopkins, Clerk. W. D. Covington, Deputy.

Citation [on Writ of Error—Copy].

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the United States and to Elmer E. Todd, its Attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Washington, Northern Division, wherein George E. Littell is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment and sentence in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the party in that behalf.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the

United States, the 8th day of October, in the year of our Lord one thousand nine hundred and eight.

[Seal] C. H. HANFORD,

United States District Judge for the District of Washington, Northern Division and Presiding in said Circuit.

Received a copy of above Citation this 8th day of October, 1908.

CHARLES T. HUTSON,

Asst. U. S. Attorney.

[Endorsed]: Citation. Filed in the U. S. District Court, Western District of Washington. Oct. 8, 1908. R. M. Hopkins, Clerk. W. D. Covington, Deputy.

United States District Court for the Western District of Washington.

No. 3709.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE E. LITTELL,

Defendant.

Praecipe for Transcript.

To the Clerk of the Above-entitled Court:

You will please insert the following in transcript on appeal in the above-entitled case:

Indictment; arraignment; verdict; motion in arrest of judgment; order denying motion in arrest of judgment; sentence; motion for new trial; order overruling motion for new trial; bill of exceptions;

petition for writ of error; assignment of errors; writ of error; citation; and this praecipe.

HOLZHEIMER & HOLZHEIMER,
Attorneys for Appellant.

[Endorsed]: Praecipe for Transcript. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 8, 1908. R. M. Hopkins, Clerk. W. D. Covington, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3709.

UNITED STATES OF AMERICA,
Defendant in Error,
vs.
GEORGE E. LITTELL,
Plaintiff in Error.

Clerk's Certificate [to Transcript of Record].

United States of America,
Western District of Washington.—ss.

I, R. M. Hopkins, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify the foregoing one hundred thirty-nine (139) typewritten pages, numbered from 1 to 139, inclusive, to be a full, true and correct copy of so much of the record and proceedings in the above and foregoing entitled cause as the same remain of the record and on file in the office of the Clerk of the said Court, as by the praecipe of the attorneys for the plaintiff in error I am required

to certify and transmit as the record on appeal from the District Court of the United States for the Western District of Washington, and as the return to the annexed Writ of Error, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California; and that the foregoing record constitutes the Record on appeal and return to said annexed Writ of Error.

I further certify that I annex hereto and herewith transmit the Original Citation and Writ of Error.

I further certify that the cost of preparing and certifying the foregoing record on appeal and return to Writ of Error is the sum of $100.30, and that the said sum has been paid to me by Holzheimer and Holzheimer, Attorneys for Plaintiff in Error.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at Seattle, in said district, this 30th day of October, 1908.

[Seal] R. M. HOPKINS,
Clerk.

Writ of Error [Original].

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Honorable the Judge of the District Court of the United States, for the District of Washington, Northern Division, Greeting.

Because, in the record and proceedings, as also in the rendition of the judgment and sentence of a plea which is in the said District Court before you, between George E. Littell, plaintiff in error, and the United States, defendant in error, manifest error hath happened to the great damage of the said George E. Littell plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid, in this behalf, do command you, if judgment and sentence be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco in the State of California on the 7th day of November, next, in said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to

correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, the 8th day of October, in the year of our Lord one thousand nine hundred and eight.

[Seal] R. M. HOPKINS,

Clerk of the United States District Court for the District of Washington.

Allowed by: ——————,

District Judge of the United States District Court, Northern Division, District of Washington, Presiding in said Circuit.

C. H. HANFORD,

Judge.

Recd. a copy of the above Writ of Error this 7th day of October, 1908.

CHARLES T. HUTSON,

Asst. U. S. Attorney.

[Endorsed]: No. 3709. In the United States District Court for the Western District of Washington. The United States vs. George E. Littell. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 8, 1908. R. M. Hopkins, Clerk. W. D. Covington, Deputy. Holzheimer & Holzheimer, Lawyers, 535-7-9 Burke Bldg., Seattle, Wash. Attorneys for Defendant.

Citation [on Writ of Error—Original].

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the United States and to Elmer E. Todd, Its Attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Washington, Northern Division, wherein George E. Littell is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment and sentence in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the party in that behalf.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, the 8th day of October, in the year of our Lord one thousand nine hundred and eight.

[Seal] C. H. HANFORD,

United States District Judge for the District of Washington, Northern Division and Presiding in said Circuit.

Received a copy of the above Citation this 8th day of October, 1908.

[Seal] CHARLES T. HUTSON,

Asst. U. S. Attorney.

[Endorsed]: No. 3709. In the United States District Court for the Western District of Washington. The United States vs. George E. Littell. Citation. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 8, 1908. R. M. Hopkins, Clerk. W. D. Covington, Deputy. Holzheimer & Holzheimer, Lawyers, 535-7-9 Burke Bldg., Seattle, Wash. Attorneys for Defendant.

[Endorsed]: No. 1665. United States Circuit Court of Appeals for the Ninth Circuit. George E. Littell, Plaintiff in Error, vs. The United States, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Filed November 5, 1908.

F. D. MONCKTON,
Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE E. LITTELL,
Plaintiff in Error.
vs.
UNITED STATES,
Defendant in Error.

No. 1665.

FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION, UPON WRIT OF ERROR.

BRIEF OF PLAINTIFF IN ERROR.

F. H. HOLZHEIMER and
W. A. HOLZHEIMER,
Attorneys for Plaintiff in Error.

Press of Mensing-Muchmore & Emme, Seattle

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE E. LITTELL, *Plaintiff in Error.* vs. UNITED STATES, *Defendant in Error.*	No. 1665.

FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION, UPON WRIT OF ERROR.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The defendant was indicted, tried and convicted for a violation of the Act of April 18, 1884 (1 Supp. Rev. St. U. S., p. 425, (U. S. Comp. St. 1901, p. 3679), which reads as follows:

"That every person who with intent to defraud either the United States or any person, falsely assumes or pretends to be an officer or employee acting under the authority of the United States, or any department or any officer of the government thereof, and who shall take upon himself to act as such, or who shall in such pretended character, demand or obtain from any person or from the United States, or any department or any officer of the government thereof, any money, paper, document, or other valuable thing, shall be deemed guilty, etc."

The indictment contains five counts, the fifth count of the indictment being taken from the consideration of the jury, so that the trial was had wholly upon the first four counts contained in the indictment, and charged that the defendant in the months of May and June, 1907, in Seattle, County of King, State of Washington, having then and there unlawfully, knowingly and feloniously, and with attempt to defraud one Josephine C. Dabney and divers and sundry other persons to the grand jury unknown, falsely assumed and pretended to be an officer and employee acting under the authority of the United States secret service, and in such pretended character and as such officer and employee as aforesaid, did unlawfully, knowingly and feloniously demand and obtain from said Josephine C. Dabney a thing of value, to-wit: In the first count, board and lodging to the value of $30.00; in the second count, cash to the value of $2.00; in the third count, cash to the value of $5.00; in the fourth count, cash to the value of $600.00.

It appears from the testimony of Josephine C.

Dabney, the prosecuting witness, that during the months of May and June, 1907, she resided in the City of Seattle with her two daughters, of the ages of sixteen and seventeen, and at that time was running a rooming house; that she had been divorced from her husband on the 23rd day of March, 1907; that on or about the 1st of May, the said Josephine C. Dabney caused an advertisement to appear in the "Times," a paper published in the City of Seattle, State of Washington, which read as follows: "Middle-aged, refined lady wishes the acquaintance of a worthy gentleman of same age with city references. Object, matrimony"; that on or about the 1st day of May, 1907, and in answer to this advertisement, the plaintiff in error called at the house of said Josephine C. Dabney and introduced himself as Captain George E. Littell; that plaintiff in error had considerable talk with the prosecuting witness and finally rented a room for the purpose of living in the same house with the prosecuting witness, and the first count in the indictment charges that he obtained the board and lodging amounting to $30.00 because of the fact that he represented himself to be an officer of the United States government. As shown by the second count, on or about the 25th day of May, 1907, the said plaintiff in error, and while boarding with the prosecuting witness, obtained from her the sum of $2.00; and as shown by the third count, on or about the 3rd day of June, 1907, the plaintiff in error obtained from the prosecuting witness the sum of $5.00, and that on or about the 12th day of June, 1907, as shown by the

fourth count, the said plaintiff in error received the sum of $600.00. It appears further that on or about the 17th day of June, 1907, the plaintiff in error left the house of the prosecuting witness and has never since returned to the same, but was arrested and brought to trial and found guilty by the jury on the 21st day of July, 1908.

False impersonation has been defined as the offense of falsely impersonating another, or representing oneself to be another and acting in the character thus assumed either with a view of obtaining some property or exercising some right belonging to such person, or with a view of subjecting such person to some legal liability. It has also been defined: To impersonate is to assume the character of such person without lawful authority, and in such character do something to his prejudice or to prejudice another without his will and consent.

Burrill's Law Dict.
Black's Law Dict.
2 *Bouv. Law Dict.*

ASSIGNMENT OF ERRORS.

Quite a number of errors have been assigned by plaintiff in error, and they can be considered under the following heads:

1. The admission of improper testimony in the trial of said cause.

2. In overruling defendant's motion to dismiss

the action as against the defendant at the close of the prosecution's testimony.

3. In charging the jury as to the law of the case.

4. In overruling defendant's motion for a new trial, said motion being based upon the insufficiency of evidence to sustain either of the counts stated in the indictment, and the insufficiency of the evidence to sustain the verdict.

ARGUMENT.

Counsels for plaintiff in error have searched in vain through the transcript of the record for any testimony that would be sufficient in law to justify or sustain the verdict of the jury, or for testimony which would in any way or at all prove or sustain the charge made in the indictment and the first four counts thereof, which specifically charges that the plaintiff in error presented to be an officer of the United States Secret Service, and in such pretended character as such officer, did unlawfully, knowingly and feloniously demand and obtain from said Josephine C. Dabney property of value.

To warrant the conviction of the charges made in the indictment, the government must show:

1st. That the defendant assumed to be an officer of the government.

2d. That the same was false.

3rd. That the assumption was made with the intent to defraud Josephine C. Dabney.

4th. That such intent was carried out and that the defendant did by reason of his false character, or because of his false assumption defraud the said Mrs. Dabney.

> 43 Fed., *U. S. vs. Curtin.*
> *Am. & Eng. Ency. of Law,* Vol. 12, p. 788.
> 53 Fed. 542, *U. S. vs. Bradford.*

It is a well known rule of law that indictments must allege that by reason of the false pretense or impersonation, property or other things of value were obtained, and if this be true, how much more necessary it would be to prove that by reason of false impersonation, a property was obtained.

> *McClain Criminal Law,* Vol. 1, p. 701.

False impersonation must be made with the intent to defraud.

> *U. S. vs. Farnum,* 127 Fed. 478.
> *U. S. vs. Brown,* 119 Fed. 482.
> *U. S. vs. Taylor,* 108 Fed. 621.
> *U. S. vs. Curtin,* 43 Fed. 433.
> *U. S. vs. Bradford,* 53 Fed. 542.
> *People vs. Murin,* 19 Pac. Rep. 832.

It has been universally held that the false pretense made use of for the purpose must have been believed and relied upon by the defrauded party, and have been the means of or the controlling inducement

in causing the defrauded party to part with the property. In other words, the false pretense or impersonation must be the controlling inducement or influence in the matter.

Am. & Eng. Ency. of Law, Vol. 12, p. 819.
St. vs. Bloodsworth, 25 Ore. 23.
89 *Am. St. Rep.*, 18.
Am. & Eng. Ency. of Law, Vol. 12, p. 84.
U. S. vs. Farnham, 127 Fed. 478.

The above is the great weight of authority, but it has also been held upon very good authority that the false pretense must be the sole inducement.

Bryant vs. Com., 47 S. W. Rep. 578.
Blom vs. State, 20 Tex. App. 593.

The law with reference to false pretenses and cheats throughout the United States is closely analogous to and is interwoven with the law with reference to false impersonation. In the first place the pretense, no matter how false, must be calculated to deceive.

Meek vs. State, 23 So. Rep. 115.
Cowan vs. People, 14 Ill. 341.
Shafer vs. State, 82 Ind. 224.
Watson vs. People (N. Y.), 41 Am. Rep. 397.

It is further held that where the defrauded party has, at the time when the false representation is made, the means of detection at hand for ascertaining its truth or falsity, he cannot be said to be deceived by it,

and it is therefore not a false pretense within the statute.

> *Woodbury vs. State* (Ala.) 44 Am. Rep. 515.
> *Com. vs. Grady* (Ky.), 26 Am. Rep. 192.
> *Miller vs. People*, 22 Col. 530.

Considerable testimony was admitted by the court, which went to the jury, and the court also refused to strike out the same from the record, which absolutely, in the judgment of the counsels for the plaintiff in error, was incompetent and immaterial for any purpose, and only could be prejudicial to him by allowing the same to be considered by the jury, as part of the case for the prosecution, particularly as follows: For the testimony of Josephine C. Dabney as found on page 20 of the transcript, with reference to burglar alarms; also, the testimony of the witness, Josephine C. Dabney, as found on pages 22 and 23 of the transcript, with reference to certain packages or paper which looked like money or plates of some kind, the same being highly prejudicial and incompetent for any purpose; also, the testimony of the witness, Josephine C. Dabney, as found on pages 26 and 27 of the transcript, with reference to her reason for loaning money to the defendant, for the reason that the same is immaterial and incompetent for any purpose, and are only a conclusion of the witness, which conclusion the jury alone should draw from all of the testimony in the case; also the testimony of the witness, Josephine C. Dabney, as found on page 29 of the transcript, with reference to her reason for

loaning money to the defendant; also, the testimony of the witness, Josephine C. Dabney, as found on page 30 of the transcript, with reference to burglar alarms, and also, their admission as evidence in said cause; also, the testimony of witness, Josephine C. Dabney, as found on pages 51 and 52 of the transcript, with reference to her talk with the witness, Crawford, and the conclusion of the witness, that what the defendant did, he did for the purpose of robbing her; also, the testimony of Charles Crawford, as found on pages 60 and 61 of the transcript, with reference to a hypodermic outfit and the fact that the defendant had under his nightrobe a revolver or gun.

Counsel for the defendant believes further, that the court erred in refusing to allow the defendant to recall the prosecuting witness, Josephine C. Dabney, for further cross-examination at the close of the prosecution's case, the refusal would have compelled the defendant to have called the witness, Josephine C. Dabney, as their own witness, and also, the remark of the court at the time of his refusal to allow the witness to be recalled, in which he used the following language: "The court will accommodate you if it is of any importance, but if you just want to quiz her and cross-examine her again to a long extent, I do not feel inclined to do so." All of the above testimony, which was admitted by the court and by the court refused to be stricken from the record and taken from the jury, is of a highly prejudicial character. Its admission to the jury as part of the case by them to be considered, introduced matters before them, which

under no view of the law of the case would be competent or material for any purpose, as said testimony had no bearing on the question of false impersonation or the guilt of the defendant, but would leave the impression with the jury, as counsel sees it, that he was guilty of almost any other crime against the government, particularly that he might be a counterfeiter, and had in his possession plates from which money could be made; that he was at that time engaged in the unlawful occupation of either the making or passing of counterfeit money; also, it had a tendency to make the jury believe to the defendant's prejudice that he was a morphine fiend and carried a hypodermic outfit for the purpose of using morphine, and further that he was a desperate character, for the reason that he had a gun with him in the bathroom of the prosecuting witness' house, none of the matters or things herein mentioned being brought to the attention of the complaining witness, or having a tendency to influence her in any manner whatsoever. The matters and things herein related and to which reference is made in the transcript denied the defendant the right of a fair trial before the jury, and the jury must have been prejudiced to a great extent by this testimony, from which they could constru almost any conceivable act or crime on the part of the defendant.

One of the instructions of the court to the jury is found on pages 129 and 130 of the transcript, which in the judgment of the counsel for the defendant, is wholly misleading and does not state the law of the

case to the jury, nor does it properly state the law as we see it with reference as to what is the controlling or moving influence for the reason that the court in its construction used the following language, which makes nugatory and of no effect the instruction that the false impersonation must be the controlling influence, which instructions read as follows:

"Now, as in addition to obtaining board and lodging without paying for it, and obtaining money at different times upon the credit of his pretending a United States officer's character he so far won her confidence that he obtained from her a promise of marriage, and that in hope of marriage she was influenced in letting him have her money. We believe that the law is conclusive in this that if the prosecuting witness because of her expectation to enter into the marriage relationship with the defendant, loaned him the money in question, he is absolutely not guilty of the crime as charged in the indictment. The tendency of the instruction herein quoted, taking all of it into consideration, is to inform the jury that the question of the expected marriage as between the witness, Josephine C. Dabney, and the defendant would have no bearing upon the case, if he became acquainted with her and introduced himself to her as an officer of the government. The question as to whether or not he was an officer could easily have been proven or disproven. The evidence conclusively shows that she gave no further thought in reality to the occupation of the defendant.

For the purpose of brevity we will now discuss the assignment of error, the refusal of the court to dismiss the action at the close of the prosecution's testimony and the overruling of the defendant's motion for a new trial, for the insufficiency of evidence to sustain either of the counts in the indictment or to sustain the verdict. So far as counsel for the defendant is able to ascertain, there are only two cases which have been decided by the federal courts where the charge against the defendant was false impersonation, which have any bearing upon the case at bar, the first one being the case of the *United States vs. Ballar,* found in the 118 Fed., p. 757, which is a case where the defendant represented himself to be a United States marshal, and applied for a week's lodging with bed and board, and stated at the time that he would pay for the same as soon as he received his expected pay as deputy marshal. This case is one which is relied upon by the prosecution to a great extent as a case analogous to the one at bar. One contention is, however, that this case is radically and diametrically opposed to the case at bar for the reason that the representation of the defendant as to his being a United States deputy marshal was made at the time that he sought to obtain the board and lodging upon a promise to pay out of the wages, which he expected to receive in a week or two. This we take it, brings his case directly within the statute as quoted in this brief in this, that he comes within the provision of one, who in a pretended character obtained from any person something of value.

The case of the *United States vs. Farnham* represented 127 Fed., p. 478, is a case which we believe is absolutely a case in every respect like the case at bar, for the reason that it contains within it all of the elements, and in fact, other elements than can be found in the present case. It appears that the defendant was charged under the same statute as in this case; that he represented himself to a hotel keeper that he was a government secret service agent, engaged on business of the government and exhibited to the prosecuting witness a metal badge upon which were the words "Secret Service, U. S. A." This representation was false; the defendant had never been a member of the secret service, but he did this in order to obtain money from the prosecutor. Some months afterwards, he returned to the hotel and represented himself as a traveling salesman and spent several days at the hotel. Towards the end of his stay, he gave the prosecuting witness a check, which he said had been signed by his employer, and obtained $70.00, and on the prosecution of this case, the witness testified and declared that he cashed the check because he continued to believe the statement of the defendant, that he was a secret service operator, and for that reason, he was influenced to give the defendant credit for uprightness and ability to pay his bills. The court also used the following language: "I think the testimony should be more certain than in the present case. The prosecutor may have had other motives to lead him to part with the money." He believed the defendant to be a Freemason, and had taken special

care of him during illness on that account; they were evidently on friendly terms, not merely on the footing of guest and landlord, and then too appeared the additional fact to which prosecutor might reasonably be supposed to have given some credit, namely: The presentation of a check apparently regular, and declared to have been drawn by defendant's employer. How fitting is this case to the one at bar? The prosecuting witness expected to marry the defendant; they were not on the footing of guest and landlord, also, there was the addition reason of the cashing of the draft of $600.00, apparently regular and correct, and which under the testimony, the prosecuting witness was to hold as security until both she and the defendant took a trip east and should personally see the defendant's father in Detroit, Michigan. The verdict in the case above referred to was set aside for the reason herein assigned, and the court absolutely ignored the statement of the prosecuting witness that he believed that the defendant was a secret service employee, and for that reason he extended the credit to him. This case is particularly called to the attention of this honorable court, as in our judgment, it states the plain law upon the question of false impersonation under the statute by virtue of which the defendant is charged with crime. An analysis of the testimony in this case only serves to emphasize the fact that the witness, Josephine C. Dabney, was a woman of mature years, who had been married and divorced, and had grown children; that a short time after her divorce, she advertised in one of the daily

papers in Seattle, Washington, for a gentleman acquaintance, the object of which was matrimony. She admits this and testifies to the same. That in answer to this advertisement, the defendant appeared in person, and under the testimony, introduced himself as Captain George E. Littell of Mexico, and stated that he was employed in the secret service department of the government, and was in Seattle in regard to paying off men and hastening the work on the Federal Building. We desired to call the court's particular attention at that time to the testimony of the witness at their first meeting (Transcript, pages 16 and 17), that defendant stated that he had at that time sent in his resignation to the government, and did not expect to work but a short time for the government, and that the witness, Josephine C. Dabney, testified that during the first conversation she had with the defendant, the defendant wanted to know if she owned that place, meaning her rooming house. Did the defendant go into the house of the prosecuting witness as a boarder or upon the strength of his being a United States secret service officer. This must be emphatically answered no. From the testimony, he went into her house as the prospective husband of the prosecuting witness. They were not upon the footing of landlord and guest, but he, the defendant, was a privileged guest, and one from whom the prosecuting witness never at any time during his residence there of a month and one-half, ever asked to pay his board. She never made any demand upon him to pay his

board, but on the contrary, from the testimony, she loaned him divers and small sums of money during that period of time. The prosecuting witness made no effort, although she was in the same city in which the government building was being erected, as testified to, to find out as to whether or not the defendant was employed on the same, or otherwise she did not seem to care at the time whether he did or not, and this may be true because of the fact of the statement of the defendant that he had sent in his resignation. If this be true, how could it be upon the strength of false impersonation that the prosecuting witness parted with anything of value? The testimony of the prosecuting witness as to the first meeting, in answer to the advertisement, is found on pages 16 and 17 of the transcript, and also pages 36 and 37 of the transcript, as to the reason of the defendant appearing at the home of the prosecuting witness. On page 28 of the transcript, the witness testifies that the defendant, after he had been at her home about four weeks, rushed in and asked to borrow $600.00, stating that he could not reach his father by wire, and the witness testified that she then and there said, "What security have you, or what will you give me for that money?" The defendant in answer thereto said, "A draft. I will draw it on my father," and that she could collect it when she went east; also, that the defendant told her to keep the draft and take care of it; also, the testimony of the prosecuting witness, as found on pages 44 and 45, with reference to her loaning the said $600.00; also the testimony of

the prosecuting witness as found on page 55 of the transcript, in which the witness stated that the defendant said that the reason he desired to borrow the money was that he was settling up an heirship property for people in the east, and that he wanted to buy out the heirs, as he could make money in that way; that if the defendant had borrowed the money for investment and upon the grounds stated, and was engaged to marry defendant, it is impossible to conceive that the moving, controlling inducement which caused the prosecuting witness to part with her money or her board and lodging was brought about or influenced by the fact that the defendant impersonated a United States officer, because even if he made the statements attributed to him, he at the same time stated that he had send in his resignation, and therefore, the prosecuting witness could not by any stretch of imagination look forward to the defendant's receiving any salary or benefit from the government after he had resigned. She must have known and expected, even if she believed his statements, that he no longer would be in the employ of the government. The prospective marriage of the defendant and the prosecuting witness was the sole, controlling and only moving factor in the case, with its minor incidents as to the lending of money and taking a draft upon the defendant's father as security for the same.

The prosecution has absolutely failed to show that the defendant was not an employee of the government, or that if he assumed to be, the assumption

was false, and therefore his conviction of the crime charged is contrary to law.

The evidence in this case does not or cannot sustain the different counts in the indictment, nor can it support or sustain the verdict of the jury in the action. The verdict of the jury should be set aside and the action dismissed upon the showing herein made.

Respectfully submitted,

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W. A. HOLZHEIMER,
Defendant's Attorneys.

537 Burke Bldg., Seattle, Wash.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE E. LITTELL, *Plaintiff in Error.* vs. THE UNITED STATES OF AMERICA, *Defendant in Error.*	No. 1665

UPON WRIT OF ERROR FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Defendant in Error

ELMER E. TODD,
United States Attorney,
CHARLES T. HUTSON,
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The Ivy Press, Second and Cherry, Seattle

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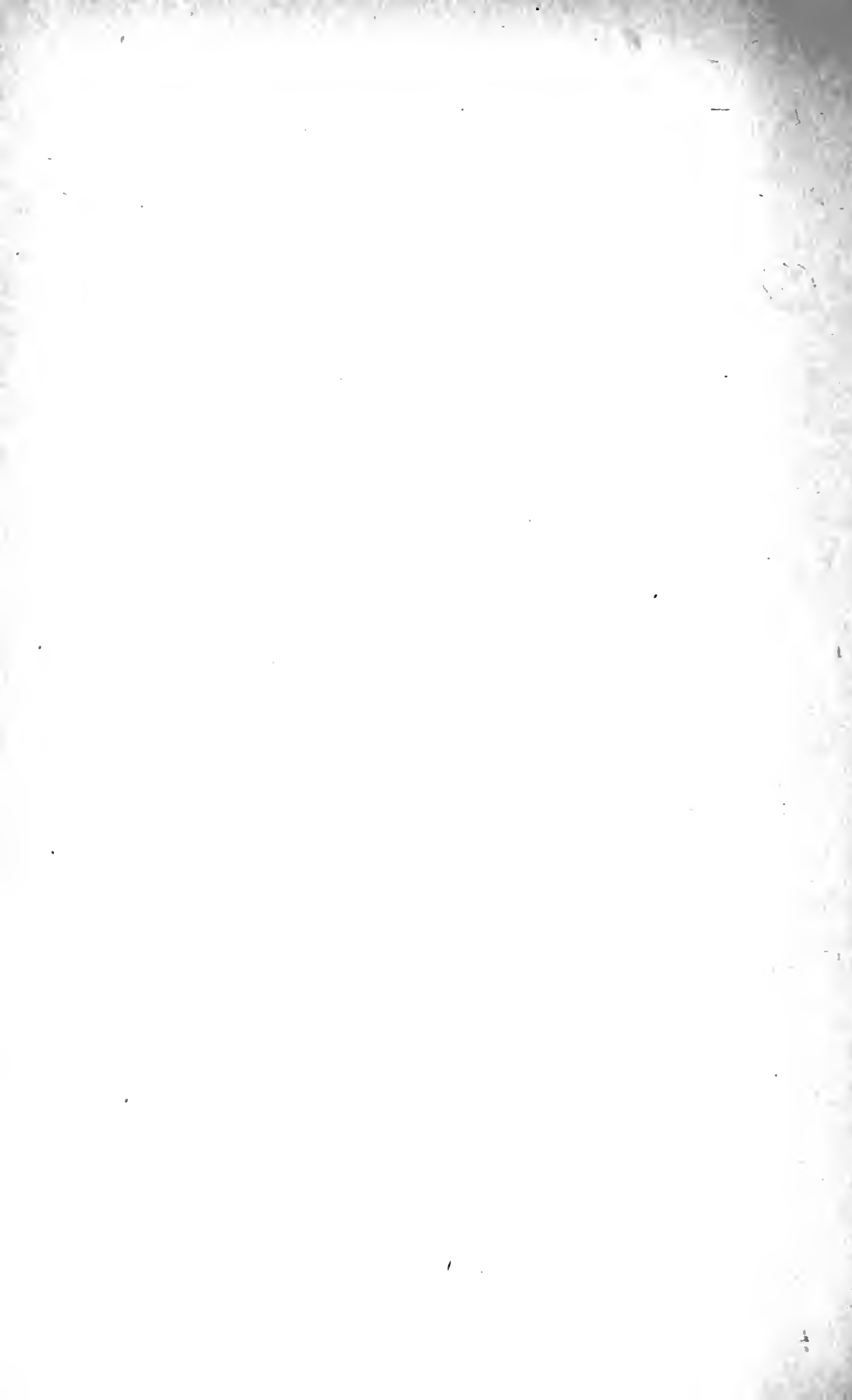

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STATEMENT.

Pages one and two of brief of plaintiff in error are substantially correct. The Josephine C. Dabney therein referred to was a widow residing during the months of May and June, 1907, with her two daughters, aged sixteen and seventeen, at 614 University Street, Seattle, King County, Washington. She conducted a rooming house of eleven rooms, and thus supported herself and daughters. They had no other means of support. (Record, p. 15). Among the applicants for lodging was plaintiff in error, who ap-

peared about May 11, 1907, at the aforesaid address, and introduced himself as "Captain George E. Littell, of Mexico," and by way of references stated that he was an officer of the United States secret service, and then in Seattle to superintend and hasten the work on the federal building, and other works that the Government was then constructing, etc., (Record, p. 16). On the Sunday following said May 11, 1907, plaintiff in error arranged for both board and lodging at six dollars ($6.00) per week, (Record, p. 19). He remained there until June 17, 1907, approximately five (5) weeks, the account for said board and lodging amounted to thirty dollars ($30.00), none of which was ever paid by plaintiff in error to said Josephine C. Dabney, (Record, p. 24).

The first count in the indictment covers the said item of thirty dollars. The testimony of said Josephine C. Dabney (Record, pp. 15 to 56), clearly sets out the very acts and statements of the plaintiff in error wherein and whereby he represented to said Josephine C. Dabney that he was in the employ of the United States secret service, and on what work he was detailed, etc., during the time he boarded with her. With reference to said charge of thirty dollars for board and lodging, she states that she believed these representations, that he was a United States

secret service man, and trusted him, and would not have permitted the account to run had she not relied so completely on his statements. All others paid her in advance. (Record, 24-27).

During the first week that plaintiff in error was at said lodging house, he requested and obtained the sum of two ($2.00) dollars from said witness Dabney, no part of which was ever repaid her. This, it is charged in the second count of the indictment, occurred on or about May 25, 1907, but the testimony shows that it was during the first week of his stay, (Record, p. 25).

During the last week plaintiff in error was there, he requested and obtained from witness Dabney the sum of five dollars, ($5.00) to pay for his laundry, no part of which has ever been repaid to her, (Record, p. 25). This, it is charged in the third count of the indictment, occurred on or about the first day of June, 1907. The testimony, however, shows that it was during the last week of his stay.

With reference to the said two dollars and the said five dollars, said Josephine C. Dabney stated that she would not have let plaintiff in error have had the said sums if she had not believed that he was all that he represented himself to be, viz: in the United States secret service, etc., (Record, p. 27).

During the third or fourth week of plaintiff in error's stay at said lodging house, said Josephine C. Dabney sold out her interest in said lodging house, receiving therefor about nine hundred and fifty ($950.00) dollars net, and about one week later, or about the 12th day of June, 1907, (as charged in the fourth count of said indictment), he requested of and obtained from said witness Dabney the sum of six hundred dollars ($600.00), for which he gave her a draft drawn on a man whom he stated to her was his father, no part of which sum has ever been repaid to her. The testimony of witness Dabney shows (Record, p. 29) that she let him have this sum of money on the belief that he was in the secret service, doing the work that he represented he was doing, etc., (see also Record, pp. 39-40-51).

On the 17th day of June, 1907, plaintiff in error left the house of said Josephine C. Dabney under the pretense that he was going to stay with his father, whom he informed her was stopping at the Hotel Savoy, in Seattle, and other than a telegram from Billings, Montana, received on the 20th of June, was not again seen or heard from by said Josephine C. Dabney (Record, p. 34), until about one year later when she attended his preliminary hearing in San

Francisco, California, where he had been intercepted on his way to Auckland, Australia, (Record, p. 94).

Plaintiff in error was never in the employ of the United States secret service while in Seattle during said months of May and June, 1907, nor did he then hold any position in the employ of the Government of the United States, (Record, pp. 86-87-95).

Plaintiff in error received a jury trial in Seattle, Washington, July 21, 1908, on the indictment hereinbefore referred to, and was convicted and was thereafter on August 10, 1908, sentenced to be imprisoned for a term of two years in the United States Penitentiary at McNeils Island, Washington, and to pay a fine of one thousand dollars and costs of prosecution (Record, p. 10), from which plaintiff in error has perfected this appeal.

ARGUMENT.

We will first consider plaintiff in error's assignment of errors, as shown by record, page 124, and take them up in their order.

Assignment No. 1 refers to the admission of certain testimony of Josephine C. Dabney, relative to burglar alarms which plaintiff in error said he had, and that he could put same on the windows and doors of his room, and did so. The testimony was clearly competent as showing a part of a series of acts and statements of plaintiff in error made in the presence of and to said Josephine C. Dabney, to impress her with the truth of his representations as to the work he was in. The competency is clearly shown when connected up with the answer of said Josephine C. Dabney when she resumed after being interrupted by counsel. She then said:

"He said he used those because of the work he was doing, paying off the men, and the like of that, that he might have quite a good deal of money to pay off these men, and not only that, he had Government papers that were very valuable, and he wanted them to be secure, and later on he hired a man to look after these papers." (Record, p. 20.)

Assignment No. 2 refers to certain papers which said witness Dabney saw in the room of plaintiff in

error (plaintiff in error being present), and which she said looked like paper money. Witness Dabney resuming said (Record, p. 23):

> "He (meaning plaintiff in error), said that was some work that he had done in the United States secret service, that is the answer he made, and he picked it up and put it in his satchel."

This is just another circumstance showing that he continuously represented to witness Dabney that he was in the United States secret service work, and we think clearly competent.

Assignments Nos. 3, 4 and 5 refer to the testimony of witness Dabney, wherein she stated why she permitted the board and lodging account of plaintiff in error to run for so many weeks, (Record, p. 24), and why she let him have the various sums of money as charged in the indictment (Record, pp. 26-27-29). Witness was then testifying as to the representations of plaintiff in error, and whether she believed them or not is a fact which she knew better than anyone else. She stated that she believed them, and relying thereon, let him have certain things of value. She is competent to testify as to her state of mind at the time of the occurrence of these transactions. It is for the jury, however, to decide whether they believed her or not.

Assignments Nos. 6 and 7 refer to the introduction in evidence of the burglar alarms referred to in assignment No. 1. They were clearly competent as showing a circumstance in the course of conduct of plaintiff in error toward witness Dabney (Record, p. 30).

Assignment No. 8 refers to testimony given by witness Dabney on cross-examination. Se was asked by counsel for plaintiff in error (Record, pp. 51-52):

"To whom did you first talk about this secret service business after Mr. Littell had gone away?" to which she replied:

"I didn't talk with anyone only just Mr. Crawford. I asked him, I said "It don't seem to me that a man had a right to come in there and represent himself as a United States secret service man, and he did that for the purpose of robbing me."

Counsel for plaintiff in error themselves brought the answer out, and made no attempt to interrupt witness Dabney while giving said answer, and counsel should not now be heard to complain. In any event, if there was error in not granting plaintiff in error's motion to strike said answer, it was in no way prejudicial.

Assignment No. 9 refers to a hypodermic outfit and to a revolver which plaintiff in error had among his effects at the Dabney lodging house. Witness

Crawford roomed at the same house and saw plaintiff in error many times, and saw these things among the effects of plaintiff in error. We believe the testimony competent, but submit that if error was committed, it was harmless and in no way prejudicial.

Assignment No. 10 refers to the refusal of the district court to permit counsel for plaintiff in error to recall witness Dabney for further cross examination at the close of the Government's case. The honorable district judge requested a statement from counsel for plaintiff in error as to what they desired to interrogate witness Dabney on. Cousel then stated as follows: (Record, p. 107.)

"I want to show a document to her, show her the papers that she claims to have seen relative to the question of the defendant being a United States officer and present to her, and also the United States Political Map and the stock certificates and many other things. I didn't have them here Friday, but I have them here now. We have what she claims this man showed to her as a United States officer. We have that here, and have the stock certificates that she claimed looked like money, and I have the map."

After hearing same the honorable district judge denied the request for the reason that the matter that counsel desired to interrogate witness Dabney on was all matter for plaintiff in error to prove as a part of his defense. We submit that no error was committed

as the subject-matter of said statement or offer was clearly a part of the affirmative proof of the defense.

We will pass assignment No. 11 for the present.

Assignment No. 12 refers to that portion of the charge to the jury as follows: (Record, p. 114.)

"The theory of the prosecution is that the defendant successfully prosecuted a design to commit a fraud by pretending to be an officer so as to establish a credit and to win the confidence of Mrs. Dabney. Now, if in addition to obtaining board and lodging without paying for it and obtaining money at different times upon the credit which his pretended United States official character gave him, he so far won her confidence that he obtained from her a promise of marriage, and that in the hope of marriage she was influenced in letting him have her money, the fact that the expected marriage had an influence upon her would not within the instructions as given here be a defense in the case—that is, it would not detract from the false pretense because he had won her confidence so far—the real question in the case is whether or not the false pretense was the controlling influence by which he obtained the money and the board and lodging."

We believe no error was committed in giving said instruction. The whole substance of said instruction resolves itself down to this: The real question in the case is whether or not the false pretense was the controlling influence by which he obtained the money and the board and lodging. There is no question but that such is the law, and perhaps it is not

necessary for us to go further than to say that counsel for plaintiff in error agree with us in this (page 7, brief of counsel for plaintiff in error).

Assignment No. 13 refers to that portion of the charge of the district judge as follows: (Record, p. 116.)

"I submit three forms of verdict. You are authorized to return a general verdict. If the defendant is not found guilty upon one of the first four counts of the indictment, your verdict will be that you find the defendant not guilty. If you find him guilty of either one or all of the charges contained in the first four counts of the indictment, you will return a verdict that you find the defendant guilty as charged in the indictment."

A sufficient answer to the same is found in:

Claassen vs. United States, 142 U. S. Reports, p. 147.

"It is settled law of this court and in this country generally that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary the presumption of law is that the court awarded sentence on the good count only."

Assignments Nos. 11 and 14 refer to the refusal of the district court to dismiss the action as against the plaintiff in error at the close of the Government's

case, and in the refusal to grant the motion of counsel for plaintiff in error for a new trial.

No testimony was offered by plaintiff in error, so the same testimony was before the district court at the time request was made for an instructed verdict as was before the court at the time of the hearing of the motion for a new trial. The said motion for a new trial was based on the insufficiency of the evidence before the court to sustain the verdict, and on errors in the admission of evidence during the trial. The latter, we think, have been covered heretofore in this brief in considering the particular assignments of error of plaintiff in error. That leaves for consideration only the question of the sufficiency of the evidence to sustain the verdict. The honorable district judge in his instructions to the jury among other things, said:

"Before you can convict the defendant upon either one or all of the first four counts of the indictment, you must find:

"First: That the defendant assumed to be an officer or employe of the Government, the kind of an officer that is specified in the indictment, that is, an officer in the secret service.

"Second: That such assumption was false.

"Third: That the false assumption was made with the intent to defraud the said Mrs. Josephine C. Dabney.

"Fourth: That the defendant did in his assumed character and because of his false assumption, defraud the said Mrs. Josephine C. Dabney of the property or money described in the indictment." (Record, pp. 111 and 112.)

Taking the foregoing up in the order mentioned:

First: The testimony of Josephine C. Dabney, (Record, pp. 15 to 56), sets out in detail the representations plaintiff in error made to her. We will not take the time of the court to refer particularly to much of it. However, we deem it advisable to call the court's attention to certain direct representations. When plaintiff in error first called at the lodging house of witness Dabney he introduced himself as "Captain George E. Littell, of Mexico." As to his references, he stated his references were beyond question, as he was employed by the United States secret srvice, as an official, and he was here in regard to paying off men and hastening work on the federal building, and other works that came under the Government. (Record, p. 16.) When accepting a certain room in the lodging house of witness Dabney, he said, (Record, pp. 17 and 18).

"I will take this room. It's just the place I want to get into—a homelike, quiet place. I don't like to be mingling with the public. I am supposed to be by myself where I can do better work, working for the United States secret service."

When talking with witness Dabney concerning the burglar alarms which he showed her, plaintiff in error said:

"He said he used those because of the work he was doing, paying off the men, and the like of that; that he might have a good deal of money to pay off these men, and not only that, he had Government papers that were very valuable, and he wanted them to be secure, and later on he hired a man to look after these papers." (Record, p. 20.)

Plaintiff in error was possessed of a trunk and a satchel, both of which he seemed very careful of, stating that he had papers therein of great value, and at one time showed witness Dabney long envelopes which he represented contained valuable papers, (Record, p. 21).

One day when plaintiff in error was leaving to go down town he reached in his hip-pocket and held out a badge in his hand, and said to witness Dabney "That gives me the right to do what I am doing." It was a nickle badge with a pin on it, something like a policeman's badge. Witness Dabney did not examine it (Record, pp. 22 and 50).

Again plaintiff in error showed witness Dabney certain things that looked like paper money, which he explained to her was some of the work he was doing for the United States secret service. (Record, p. 23.)

At one time plaintiff in error and witness Dabney went down town and passed the new federal building. Plaintiff in error stopped and went up into the building, stating to witness Dabney that he would have to go and see how they were getting along in the building, and said further: (Record, p. 29.)

"This here work is just killing me. These men would shame a snail, they are so slow."

Plaintiff in error came hurriedly to the house of witness Dabney one day and asked her to go to the telephone with him while he talked with a man whom he had hired to care for his Government papers. He claimed the man had abused his confidence in him. He appeared, so said witness Dabney, to be talking to someone through the telephone. He was apparently very angry, pounding on the 'phone and on the wall.

Just before leaving on June 17th, he came hurriedly to the house of witness Dabney and said: (Record, p. 27.)

"He must go to North Yakima to pay the men in the United States secret service. Captain Hancock is going to relieve me of my duties in the secret service."

The night plaintiff in error went away he sent a letter to witness Dabney by special messenger. The

latter was in his own handwriting, and is an original exhibit in this case, but does not appear to be in the record. If we remember correctly it referred to the aforesaid trip to North Yakima and to Captain Hancock.

The testimony of witness Dabney, as to the representations of plaintiff in error, was corroborated by witness Crawford. Crawford knew both said Josephine C. Dabney and plaintiff in error, lived in the same house with them, and knew their voices well, and said: (Record, pp. 58 and 59.)

"I heard him tell Mrs. Dabney on different occasions about the paying off of men in the Government building, and other conversations to that effect. * * * Yes, he used to come home in the evening and say he was very tired, that the Government overtaxed him, worked him very hard."

That plaintiff in error personally told him (Crawford) that he was connected with the Government in the capacity of a secret service man. (Record, p. 58.)

James Hilton testified that plaintiff in error told him during said months of May and June, 1907, not once, but many times, that he was chief of the secret service of Seattle, also paymaster of the federal building at Seattle, and that plaintiff in error once

asked him if he (plaintiff in error) could not deposit ten thousand dollars ($10,000.00) of Government money in Hilton's safe. (Record, pp. 65 and 66.)

John Hilton testified that during said months of May and June, 1907, plaintiff in error personally informed him that he was in the secret service business, and that one of his duties was to look after some machinery down on the water front in Seattle which plaintiff in error claimed had been stolen from the Government; that plaintiff in error also informed him that he was in charge of the federal building in Seattle, and had ordered the removing of a defective stringer, a big steel girder, etc., in said building, (Record, pp. 78 and 79).

Second. Counsel for plaintiff in error cannot be heard to say that there is no evidence in the record to show that plaintiff in error was not an employe of the Government, or that if he assumed to be, the assumption was false, for the reason that the district judge instructed the jury as hereinbefore stated, that before the jury could convict plaintiff in error as charged they must find practically that plaintiff in error was not at the times referred to an officer or employe of the Government as described in the indictment. The jury returned a verdict of guilty as

charged. Nowhere in the bill of exceptions is there anything to show this court that the evidence therein contained is all of the evidence given on the trial of the case in the district court, and this court cannot presume, for the purpose of reversing the judgment herein, that there was no evidence given in the district court on the trial of said cause upon which the jury might rightfully have found the verdict which they did, and further this court cannot presume for the purpose of reversing the judgment that there was no evidence given in the district court on the trial of said cause upon which the honorable district judge might rightfully have refused to instruct the jury to return a verdict of not guilty at the close of the Government's case.

> *Nashua Savings Bank vs. Anglo-American Land-Mortgage & Agency Company*, 108 Fed. Rep., p. 764;
>
> *Metropolitan National Bank vs. Hansen*, 108 Fed. Rep., p. 572;
>
> *Sailing vs. Bolander*, 125 Fed. Rep., p. 701;
>
> *United States vs. Copper Queen Mining Company*, 185 U. S. Reports, p. 495.

We submit further that counsel for plaintiff in error in their opening statement to the jury admitted that he was not in the United States secret service during the months of May and June, 1907, when in

Seattle, and that he never had been in the United States secret service at any time. Further, the testimony of witness Moffet (Record, p. 85) and witness Farrell, (Record, p. 95) shows that plaintiff in error himself did not claim to ever have been in such employment, but stated the contrary to be the fact.

Third: That the false assumption was made with the intent to defraud said Mrs. Josephine C. Dabney is shown by the fact that one of the first questions plaintiff in error asked said Josephine C. Dabney at the time he applied for rooms at her house was if she owned the place, (Record, p. 17), and on learning that she did, he wanted to look at the rooms. It is not necessary to recite portions of the testimony given. We contend that it is sufficient to call the court's attention to the following: the staying at the house of said Josephine C. Dabney for a period of five weeks; receiving board and lodging there, for which he never paid her; borrowing at first small sums of money; then assisting her in selling this property, for which she received about nine hundred and fifty dollars net; then, pretending to her that he was in need of six hundred dollars, obtaining that sum; leaving her home on the 17th day of June, 1907, under the pretense and with the statement that his father was at the Savoy Hotel in Seattle and that he

desired to stay wtih him, thus getting his satchel and trunk out of said Josephine C. Dabney's house; the sending of the letter by special messenger, stating that he had to go to North Yakima to relieve a certain Captain Hancock; the fact that he did not stop there, but went on farther east; the sending of the telegram from Billings, Montana, telling her not to worry that he would be back shortly; and the fact that he never was seen thereafter, nor heard from by her, until nearly a year after when he was arrested in Oakland, California, and intercepted in his trip to Auckland, Australia. That the foregoing is sufficient to convince anyone that he went in the first instance to the house of Josephine C. Dabney for no good purpose, and that it was a cold-blooded, deliberate scheme on the part of plaintiff in error to defraud said Josephine C. Dabney out of what little money she had. In fact in the statements made by plaintiff in error to witness Moffett and Farrell, he admitted that the purpose in mind when he called upon said Josephine C. Dabney was an immoral one, (Record, pp. 84 to 90).

Fourth: The evidence clearly shows that the defendant by his said false assumptions did defraud said Josephine C. Dabney of board and lodging in the sum of thirty dollars, and money at different

times in the sums of two dollars, five dollars and six hundred dollars. It is not necessary to set out again those portions of the testimony of said Josephine C. Dabney wherein she said that she relied upon his representations, that she believed that he was in the United States secret service work at Seattle, and that he was in some way connected with the overseeing of the federal building at Seattle, and that he was a prominent man and in that kind of work; that she did not investigate to ascertain whether or not his representations were true because she believed that no one had a right to represent himself as doing such work unless in truth he was so employed. The testimony shows that plaintiff in error came to her house in reply to a "personal" which she had inserted in a newspaper, wherein she sought the acquaintance of a worthy gentleman of her age with city references; that after plaintiff in error had been at her home for a period of three weeks, they became engaged to be married. Counsel for plaintiff in error contend that the reason said Josephine C. Dabney permitted the said board and lodging account to run and let plaintiff in error have said sums of money heretofore mentioned was because of her affection for him as her intended husband, and not that she let him have these things solely because she believed that he was a responsible man holding the responsible positions he

represented to her he did. The law is, as we have heretofore said, and as counsel for plaintiff in error evidently agree with us, that the question is not what was the sole and only influence acting upon her at the time she parted with the aforesaid items, but what was the controlling influence. The only testimony before the court and jury was the testimony of Josephine C. Dabney, and she stated emphatically and reiterated that the only reason she let plaintiff in error have these things was that she believed his representations.

It is plain to be seen from the foregoing that she was defrauded out of these various sums of money and the board and lodging by plaintiff in error, and there is but one conclusion to reach from the evidence in the record, viz: That she was defrauded by plaintiff in error in his assumed character.

Assignment No. 15 refers to the action of the district court in denying the motion of plaintiff in error in arrest of judgment. The offense charged is statutory. Where the statute itself describes the offense an indictment is good which follows the language of the statute, and as in this case, describes what was the act done constituting the offense.

United States vs. Ballard, 118 Fed. Rep., 758.

In the brief of counsel for plaintiff in error under the heading of "Argument" a number of legal propositions are stated with which we fully agree, (brief of plaintiff in error, pp. 6 and 7), and will not make further comment upon them, but we do not agree with them wherein they state that if the means of ascertaining whether or not the representations are true or false, be at hand, and the defrauded party does not avail himself of those means then he cannot be rightfully said to have been deceived thereby. Such is not the law. If the representations be false, plaintiff in error cannot be relieved from liability thereon by reason of the fact that said Josephine C. Dabney could have ascertained that his representations were false.

Woodbury vs. State (Ala.); 44 American Reports, 515, does not support the proposition it is cited to, but the opposite and our view herein.

See also:

Watson vs. People, 87 New York, 561; 47 American Reports, 397.

In the latter part of the brief of counsel for plaintiff in error, they refer to a case which they claim to be exactly like the one at bar, viz:

United States vs. Farnham, 127 Fed. Rep., 478.

There the defendant is charged under the same statute as in this case, but:

> "It appeared that, about ten months before the money was obtained from the prosecutor, Weingartner, who was a hotel keeper in the city of Lancaster, the defendant was a guest at the hotel for several days, and while there represented himself as a secret service operative engaged upon the business of the Government, and exhibited a metal badge upon which were the words 'Secret Service, U. S.' This representation was false; the defendant had never been a member of the secret service; but he made no effort to use this falsehood in order to obtain money from the prosecutor. Ten months afterwards he returned, representing himself now as a traveling salesman, and again spent several days at the hotel. Toward the end of his stay he presented a check, which he said had been signed by his employers in payment of his salary, and obtained $70 thereon from the prosecutor. This check was drawn upon a bank that did not exist, as I recall the testimony; at all events the check was returned unpaid. * * * It is true, the prosecutor declared that he cashed the check because he continued to believe the statement of the defendant, made nearly a year before, that he was a secret service operative, and for that reason he was influenced to give the defendant credit for uprightness and ability to pay his bills; but I think that such a connection between the false representation and the obtaining of the money is *too remote* and uncertain to justify conviction."

Counsel for plaintiff in error in applying this case to suit their argument very carefully refrain from disclosing that there was a period of ten months between the time of his representations and the time

at which he obtained the money, and at the latter time he made no representations that he was a secret service operative, but that he was a traveling salesman.

We have endeavored to investigate this subject as thoroughly as possible, and to place before this court all the authorities bearing thereon we could. Upon investigation, there seems to be only seven cases where prosecutions were had under this statute reported in the Federal Reporters, as follows:

United States vs. Bradford, 53 Fed., 542 (not applicable);

United States vs. Curtain, 43 Fed., 433 (descriptive of the offense);

United States vs. Taylor, 108 Fed., 621 (considered on demurrer to indictment);

United States vs. Ballard, 118 Fed., 757 (hereafter referred to);

United States vs. Brown, 119 Fed., 482 (considered on demurrer to indictment);

United States vs. Farnham, 127 Fed., 478 (heretofore referred to).

Six of the above cases were before district judges and one before a circuit judge. We were unable to find any decisions by the Circuit Court of Appeals, or by the Supreme Court of the United States. The case that seems closest in point in every way, and in

fact is almost identical with the case at bar, is that of

United States vs. Ballard, 118 Fed. Rep., 757.

This is a Missouri case. The defendant was indicted for a violation of this same act, and was charged in one count as follows:

"* * * unlawfully and feloniously and with intent to defraud one Julia Eggeling, and divers and sundry other persons to the grand jurors unknown, did falsely assume and pretend to be an officer and employe acting under authority of the United States, and the department of justice thereof, to-wit: as a deputy United States marshal, and in such pretended character did demand and obtain from said Julia Eggeling a thing of value to-wit, lodging at the house of the said Julia Eggeling, in apartments therein, to the amount and of the value of twenty dollars, contrary to the form of the statute."

The learned district judge said, among other things:

"The elements of this offense in my opinion are more comprehensive, and do not limit the wrongful act to such extorting money or property from another under the guise of asserting a claim due to the United States, which it is the duty of the offender in his pretended official character to assert, but includes the holding of one's self out as such officer or employe for the purpose, among other things, of giving him such credit or standing as will enable him to successfully demand or otherwise obtain money from another for his own private use and benefit, and with the intent to defraud. * * * It is to be observed that the language of the latter clause of the section is

'Demand or obtain' from any person. But the indictment in this case uses the terms 'demand and obtain' conjunctively for the obvious reason that an indictmen which would charge the acts disjunctively would have been bad pleading. The rule requires the disjunctive expressions to be charged conjunctively, but it does not require, in order to sustain the indictment, that both things, to-wit, demanding and obtaining, should be proven. It is sufficient if the evidence shows, as in this case, that the party, by reason of his false personation of a deputy United States Marshal, obtained a thing of value.

"The next contention in the motion in arrest is that the obtaining of the lodging room for a month is not a valuable thing, within the meaning of the statute. To this contention I canont consent. It is true that criminal statutes are to be strictly construed in favor of personal liberty. But there is another rule equally as well established, and quite as wholesome, that, in construing remedial and protective statutes of this character, such construction should be given to them by the courts as is reasonably necessary to carry out and effectuate the legislative intent. It is doubtless well known to congress, as it is especially well known to the judges administering the criminal statutes of the United States, that the personating of United States officers, or the representing by irresponsible parties that they are in the employ of certain departments of the Government, going through the country practicing the grossest frauds and impositions upon unsuspecting and unwary people, and under color of such false representations and pretensions obtaining money, credit, personal benefits and assistance, had become so frequent as to constitute an intolerable abuse. It was to correct this abuse and to protect the community from these peripatetic and prowling imposters that this statute was enacted."

We see no reason why the decision of the district court should be reversed, and respectfully submit that the same should be affirmed.

ELMER E. TODD,
United States Attorney,

CHARLES T. HUTSON,
Assistant United States Attorney.

No. 1666

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

GEORGE ERKEL,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the Southern District of California, Southern Division

FILED
JAN 14 1909

FILMER BROS. CO. PRINT. 330 JACKSON ST., S. F., CAL.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For Plaintiff in Error:

SIDNEY DELL, Glendale, California.

Defendant in Error:

OSCAR LAWLER, United States Attorney, 502 Tajo Building, Los Angeles, California.

Writ of Error (Original).

The President of the United States of America, to the Judges of the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you between The United States of America, plaintiff, and George Erkel, defendant, a manifest error hath happened, to the great damage of the said defendant as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in

the State of California on the 21st day of November next in the said United States Circuit Court of Appeals, to be then and there held; that the record and proceedings aforesaid be inspected and the said United States Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 24th day of October, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States, the one hundred and Thirty-third.

[Seal] WM. M. VAN DYKE,

Clerk of the Circuit Court of the United States of America of the Ninth Judicial Circuit, in and for the Southern District of California.

By Chas. N. Williams,

Deputy Clerk.

The above writ of error is hereby allowed.

OLIN WELLBORN,

Judge.

[Endorsed]: No. 1258. United States Circuit Court, Southern District of California. United States of America vs. George Erkel. Writ of Error. I hereby certify that a copy of the within Writ of Error was, on the 24th day of October, 1908, lodged in the Clerk's Office of the said United States Circuit Court for the Southern District of California for the said defendant in error. Wm. Van Dyke, Clerk of the United States Circuit Court for the Southern District of California. By Chas.

N. Williams, Deputy Clerk. Filed Oct. 24, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

[Citation on Writ of Error (Original).]

UNITED STATES OF AMERICA—ss.

The President of the United States to The United States of America, Defendant in Error, and to its Attorney, Oscar Lawler, United States District Attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco in the State of California on the 21st day of November 1908, pursuant to a Writ of Error filed in the Clerk's office of the Circuit Court of the United States of the Ninth Circuit in and for the Southern District of California, Southern Division, in that certain action No. 1258, wherein the United States of America is plaintiff and George Erkel is defendant, to show cause, if any there be, why the judgment given, made and rendered against the said George Erkel in the said Writ of Error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. OLIN WELLBORN, United States District Judge for the Southern District of California and one of the Judges of the Circuit Court of the United States of America, Ninth Judicial Circuit, in and for the Southern District of California, this 24 day of October, 1908, and of the

Independence of the United States the One Hundred and Thirty-Second.

OLIN WELLBORN,

United States District Judge for the Southern District of California.

Attest: WM. M. VAN DYKE,

Clerk,

By Chas. N. Williams,

Deputy.

Received copy of the within and foregoing Citation and receipt of a copy thereof admitted this 24th day of October, 1908.

OSCAR LAWLER,

United States Attorney and Attorney for Defendant in Error.

By A. I. McCormick,

Asst. U. S. Atty.

[Endorsed]: No. 1258. U. S. Circuit Court, Southern District of California, Southern Division. United States of America vs. George Erkel. Citation. Filed Oct. 24, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

Return to Writ of Error.

The Answer of the Judges of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division:

The record and all proceedings of the complaint whereof mention is within made, with all things touching the same, we certify, under the seal of our

said Circuit Court to the United States Circuit Court of Appeals for the Ninth Circuit, in a certain schedule to this writ annexed, as within we are commanded.

By the Court.

[Seal] WM. M. VAN DYKE,
Clerk.
By Chas. N. Williams,
Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
GEORGE ERKEL,
Defendant.

Complaint.

Comes now the United States of America, by Oscar Lawler, United States Attorney for the Southern District of California, acting under and pursuant to the direction of the Attorney General of the United States, and, complaining of the defendant above named, alleges:

I.

That said United States of America is now, and at all of the times herein mentioned has been, the owner of those certain premises situate in the county of Los Angeles, particularly described as follows, to wit:

Commencing at a stone marked "U. S." on San Pedro Bay and running south seventy (70) degrees,

seven (7) minutes, west twenty and ninety-four one-hundredths (20.94) chains to a stone marked "U. S."; thence north nineteen (19) degrees, twenty-two (22) minutes, west four and ninety-seven one-hundredths (4.97) chains to a point sixteen and twenty-nine one-hundredths (16.29) chains due north from the intersection of sections Nineteen (19) and thirty (30) of Township Five (5) South, Range Thirteen (13) West, and Sections Twenty-four (24) and Twenty-five (25) of Township Five (5) South, Range Fourteen (14) West, San Bernardino Meridian; thence North Nineteen (19) degrees, twenty-two (22) minutes, west fifteen and eighty-two one-hundredths (15.82) chains to a stone post with illegible marks; thence north seventy (70) degrees eighteen (18) minutes, east twenty-one and five one-hundredths (21.05) chains to the shore of San Pedro Bay; thence with the meanderings of the shore of San Pedro Bay to the place of beginning.

II.

That heretofore, and prior to the commencement of this action, and on or about the year 1902, said defendant wrongfully, and without right, and against the will of plaintiff unlawfully entered upon said tract of land, and at all times since said time has unlawfully detained and withheld, and does still unlawfully detain and withhold the possession thereof from plaintiff.

III.

That plaintiff has been damaged by the detention and withholding of said land by said defendant in the sum of One Thousand Dollars ($1,000.00).

Wherefore, plaintiff prays that said defendant be ejected and removed from said premises and that said plaintiff have and recover possession thereof, and for damages against said defendant in the sum of One Thousand Dollars ($1,000.00).

OSCAR LAWLER,

United States Attorney for the Southern District of California.

[Endorsed:] No. 1258. In the Circuit Court of the United States, 9th Circuit, for the Sou. Dist. of California, Sou. Div'n. United States of America vs. George Erkel. Complaint. Filed Jul. 6, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

[Summons.]

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE ERKEL,

Defendant.

Action brought in the said Circuit Court, and the Complaint filed in the office of the Clerk of said Circuit Court in the City of Los Angeles, County of Los Angeles.

The President of the United States of America, Greeting: To George Erkel.

You are hereby required to appear in an action brought against you by the above-named plaintiff, in

the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division, and to file your plea, answer or demurrer, to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the Clerk of said court, in the City of Los Angeles, County of Los Angeles, within twenty days after the service on you of this summons, or judgment by default will be taken against you.

The said action is brought to recover the possession of all these certain premises situate in the County of Los Angeles, particularly described as follows: to wit: Commencing at a stone marked "U. S." on San Pedro Bay and running south seventy (70) degrees, seven (7) minutes, west twenty and ninety-four one-hundredths (20.94) chains to a stone marked "U. S."; thence north nineteen (19) degrees, twenty-two (22) minutes, west four and ninety-seven one-hundredths (4.97) chains to a point sixteen and twenty-nine one-hundredths (16.29) chains due north from the intersection of sections Nineteen (19) and Thirty (30) of Township (5) South, Range Thirteen (13) West, and Sections Twenty-four (24) and Twenty-five (25) of Township Five (5) South, Range Fourteen (14) West, San Bernardino Meridian; thence North Nineteen (19) degrees, twenty-two (22) minutes, west fifteen and eighty-two one-hundredths (15.82) chains to a stone post with illegible marks; thence north seventy (70) degrees eighteen (18) minutes, east twenty-one and five one-hundredths (21.05) chains to the shore of San Pedro Bay; thence with the meanderings of

the shore of San Pedro Bay to the place of beginning;—plaintiffs allege that heretofore and prior to the commencement of this action, and or about the year 1902, said defendant wrongfully and without right and against the will of plaintiffs unlawfully entered upon said tract of land, and at all times since said time has unlawfully detained and withheld and does still unlawfully detain and withhold the possession thereof from plaintiffs; plaintiffs further demand judgment for the sum of $1,000.00 damages for the detention and withholding of said land by said defendant; plaintiffs further pray that said defendant be ejected and removed from said premises; all of which more fully appears from the complaint on file herein, to which you are hereby expressly referred.

And if you fail to appear and plead, answer or demur, as herein required, your default will be entered and the plaintiff will apply to the Court for the relief demanded in the complaint.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 7th day of July, in the year of our Lord one thousand nine hundred and six and of our Independence the one hundred and thirty-first.

[Seal] WM. M. VAN DYKE,
Clerk.
By Chas. N. Williams,
Deputy Clerk

United States Marshal's Office,
Southern District of California.

I hereby certify, that I received the within writ on the 25th day of July, 1906, and personally served the same on the 25th day of July, 1906, by delivering to and leaving with George Erkel said defendant named therein, personally, at the County of Los Angeles in said District, a certified copy thereof, together with a copy of the Complaint, certified to by William M. Van Dyke, Clerk, etc. attached thereto.

LEO V. YOUNGWORTH,
U. S. Marshal.
By B. H. Franklin,
Deputy.

Los Angeles, July 26th, 1906.

[Endorsed]: Original. Marshal's Doc. No. 907. No. 1258. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. United States of America vs. George Erkel. Summons. Oscar Lawler, U. S. Attorney, Plaintiff's Attorney. Filed Jul. 26, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1258.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE ERKEL,

Defendant.

Answer and Counterclaim.

Defendant for answer to the complaint of plaintiff in the above-entitled action denies that the plaintiff is the owner of the land and premises described in plaintiff's complaint; denies that defendant is in possession of said premises or any portion thereof except so much of the same as lies east of a straight line beginning at a stone monument, first mentioned in the description of said premises in plaintiff's complaint, and running thence north 19 degrees 22 minutes west 20.79 chains to an intersection with plaintiff's claimed north line at a stone monument marked "U. S."; said line being distant about 140 feet from the ordinary high-tide line of the Pacific Ocean at said San Pedro bay; denies that plaintiff owns any part of said last named tract; denies, also, that said plaintiff has been damaged by the defendant's possession of said tract of land in the sum of $1,000 or any sum whatever.

Further answering herein, defendant, for a separate answer and counterclaim, by this cross-complaint against said plaintiff, alleges:

First. That heretofore, in the District Court of the United States for the District of Southern California, to wit, at the December term thereof, A. D. 1856, in a certain suit wherein Jose Loretta Sepulveda and Juan Sepulveda were plaintiff and the United States was defendant, under and by virtue of the Act of Congress dated March 3, 1851, entitled "An Act to Ascertain and Settle the Title to Lands in the State of California," a final decree was rendered and entered by said Court in favor of the said plaintiffs and against said defendant wherein it was adjudged and decreed that said plaintiffs were then and there, and ever since June 3, 1846, had been, as against said United States defendant, the owner in fee simple, by virtue of a Mexican grant dated June 3, 1846, of the tract of land known as Los Palos Verdes, situated in Los Angeles County, State of California, and described in said decree as follows: "Beginning at the south-east point of the Place Los Palos Verdes at a place called La Goleta, where there is a landmark and running in a northerly direction 8,000 varas, thence running in a westerly course 12,000 varas to some sand-hills on the edge of the beach, where there is a landmark; thence running south 5300 varas to a point on the beach called El Codo; thence running on an easterly course, leaving a reserve of 500 varas on each of the four cardinal points, 15,000 varas to the place of beginning: reference being made for further description to the grant of said lands made by Pio Pico dated June 3, 1846, to the said Jose Loretto Sepulveda and Juan Sepulveda and to the

act of juridical possession of said lands made by Leonardo Cota, First Alcalde, which said grant and juridical possession are filed in this case."

Second. That, incorporated in said grant of Pio Pico and made a part thereof, was a disena or plat of said Palos Verdes Rancho describing the boundaries thereof; that said plat showed said last course, in the description set out in said decree, ran easterly from said point El Codo following the meanders of the Pacific Ocean the entire distance of said 15,000 varas and past the premises in controversy and including the same in the exterior boundaries of said Palos Verdes Rancho, to the place of beginning, containing 31,629,43 acres; that the said "reserve of 500 varas on each of the four cardinal points," mentioned in said decree, was located on the ground, within the boundaries of said Palos Verdes Rancho, under and by virtue of the decree of judicial possession and survey made by said Alcalde Leonardo Cota on June 11, 1846, in accordance with said grant by the Mexican Nation; that said "reserve" was by said Alcade Cota's survey then and there located by means of stone monuments placed at each of the four corners thereof; said stones being more particularly located and described in the survey of said Rancho made by Henry Hancock, deputy United States surveyor, in December 1859 and incorporated in the United States patent for said Rancho hereinafter mentioned, as running from station No. 186 of said survey north 35 degrees east 1.54 chains to a rock monument at southeast corner of the Government Reserve; thence south 70 degrees west, 20.22 chains

to station at rock monument at southwest corner of said reserve; thence north 20 degrees west, 21 chains to station at northwest corner of said reserve at a rock monument; thence north 70 degrees east, 20.23 chains to station at rock monument at northeast corner of said reserve at top of a perpendicular bluff, which said corner stone monuments are the same referred to in plaintiff's complaint and include part of the premises sued for in said complaint.

Third. That said stone monuments at the southeast and northeast corners of said "reserve" and a straight line connecting the same are 140 feet distant from the ordinary high-tide line of the Pacific Ocean in front of said reserve, which said "reserve" is not bounded by said ordinary high tide line of the Pacific Ocean; that between said "reserve," so excepted out of said confirmed grant, and ordinary high tide line of the Pacific Ocean at said point is a tract of upland, extending 1,300 feet along said east boundary line of said Government reserve its entire length between said cornerstone monument and 140 feet wide down to said ordinary high tide line of said Pacific Ocean containing 2 and one half acres, more or less.

Fourth. That this defendant has acquired all of the title of said Jose L. and Juan Sepulveda, obtained by them under said hereinbefore described confirmed grant for said Palos Verdes Rancho in and to the said 2 and one-half acre tract, lying and being in Los Angeles county, California, and in said Palos Verdes Rancho and particularly described as follows: Beginning at the southeast cornerstone monu-

ment of the "Government Reserve," as located by the survey of said reserve made by Henry Hancock, deputy U. S. surveyor, in December, 1859, and incorporated in the United States patent for said Palos Verdes Rancho issued June 20, 1880; running thence north 20 degrees west, 21 chains more or less on a straight line to the northeast cornerstone monument described in said survey; thence north 70 degrees east 140 feet more or less to the ordinary high-tide line of the Pacific Ocean in San Pedro bay; thence southerly following the meanders of said Ocean to the point opposite the said beginning where said meander line intersects the south line of said Government Reserve if extended easterly; thence south 78 degrees west 140 feet more or less to the place of beginning, containing two and one-half acres more or less; that this defendant, for more than five years last past to wit, since May 2, 1882, next preceding the commencement of this action, has been in the actual, open, notorious, exclusive and continued occupation and possession of said above-described premises under claim of right and title thereto exclusive of any other right, whereby he became and is now the owner in fee simple of all the right, title and interest in said lands acquired by said Jose L. and Juan Sepulveda under said confirmed grant from said Pio Pico, dated June 3, 1846; and he has paid all State, county and municipal taxes levied and assessed during said period against said premises.

Fifth. That in December, 1859, after said degree

term 1856 thereof, confirming the title to said Palos Verdes Rancho, as hereinbefore described, Henry Hancock, Deputy United States Surveyor, under the direction of the U. S. Surveyor General of California, made a survey of said Rancho under the provisions of said Act of Congress of March 3, 1851; said survey was never returned to said United States District Court and was never revised nor approved by said Court in said case but the same was returned (without the agency of the plaintiffs in said suit or of their assigns and without the notice prescribed in such cases by the Act of Congress dated July 1, 1867) directly to the General Land Office by the said Surveyor General of California, and was incorporated into a quitclaim patent, conforming to said survey, issued June 20, 1880, by the United States in favor of Jose Loretta Sepulveda and Juan Sepulveda; that said survey describes said boundaries of said Palos Verdes Rancho as, "Beginning at a point on the shore of the Pacific Ocean at station No. 18 of the Rancho San Pedro * * and running thence along high-water mark on the beach," by its meanders to stations 1 and 2 and so on to a station where a high bluff is reached and where a survey of the actual meanders is impracticable; thence the survey is a substitute meander, along said bluff up to station 186, at which point the description proceeds as follows: "Thence north 5 degrees east, 1.54 chains to station at rock monument at the southeast corner of the Government Reserve, 500 varas square excluded by the grant and juridical possession, Station 187.

Thence south 70 degrees west 20.22 chains to station at rock monument at southwest corner of reserve; station 188, thence north 20 degrees west, 21 chains to station at northwest corner of reserve at rock monument; station 189, thence north 70 degrees east 20.23 chains to station at rock monument at northeast corner of reserve, on top of perpendicular bluff; station 190, thence north 4 degrees 36 minutes west, 6 chains to station"; thence the said survey proceeds northerly along the meanders of said Pacific Ocean to said Point Goleta, hereinbefore mentioned and did not return to the meander line in front of said Government Reserve nor make any other survey thereof than as above described nor did it connect the said east monuments of said survey by an actual line; that the said decree of the United States District Court against the said defendant (now plaintiff in this case) required said meander line in front of said Government Reserve and said east line thereof between said cornerstone monuments to be run by said surveyor to the end that the dividing line between the said lands of said grantees and the lands of the United States should be plainly defined, but by some mistake, accident or omission the said survey failed to show said lines, and the United States is now setting up a claim of title to said strip of land hereinafter described by virtue of said mistake, accident and omission of its said surveyor and is seeking to eject this defendant from said premises.

Wherefore, this defendant prays a decree against said plaintiff in favor of defendant,

First. That he is the owner in fee simple of said land described in paragraph four hereof under and by virtue of said final decree of the United States District Court made and entered at its December term, 1856, and is entitled to a quitclaim patent therefor from the United States, defendant herein.

Second. That the patent of the United States dated June 20, 1880, issued in favor of said Jose L. Sepulveda and Juan Sepulveda be set aside and canceled as to said described tract of land described in said paragraph four and reformed so as to conform to said decree.

Three. That this defendant do have such other or further relief as to the Court shall seem meet and proper and for his costs and disbursements herein.

SIDNEY DELL,
Defendant's Attorney.
HENRY STIEGLITZ,
Attorney for Defendant.

GEO. ERKEL,
Defendant.

United States of America,
District of California,
Los Angeles County,—ss.

George Erkel, defendant above named, being first duly sworn, deposes and says that he is the defendant in the above-entitled action and counterclaim in said cross-complaint; that he has read the said answer and counterclaim and knows its contents, and that the same is true of his own knowledge, except as

to such matters as are stated on information and belief, and as to those matters he believes it to be true.

GEO. ERKEL.

Subscribed and sworn to before me this 13th day of July, 1906.

[Seal] A. G. SEPULVEDA,

Notary Public in and for the County of Los Angeles, State of California.

Upon examination of the above and foregoing answer of George Erkel, defendant, I hereby certify that, in my opinion, it is well founded in point of law.

HENRY STIEGLITZ,

Of Counsel.

I concur in above certificate.

SIDNEY DELL,

Of Counsel.

[Endorsed]: No. 1258. U. S. Circuit Court, Ninth Circuit, So. District of California, Southern Division. United States of America, Plaintiff, vs. George Erkel, Defendant. Deft's Answer and Counterclaim. Copy of within complaint served this 7th day of Aug., 1906. Oscar Lawler, Plffs. Atty. Filed Aug. 7, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Sidney Dell, Defts. Attorney. Henry Steiglitz, Defts. Atty. Res: San Pedro, Cal.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE ERKEL,

Defendant.

Findings of Fact.

This action coming on regularly on the 2d day of March, 1908, for hearing and trial by the Court without a jury, a trial by jury having been heretofore expressly waived in open Court, and said waiver having been entered upon the minutes of said Court, Oscar Lawler, United States Attorney for the Southern District of California, appearing for and on behalf of the plaintiff, and Sidney Dell, Esq., appearing for the defendant, and evidence having been introduced and the cause having been argued by counsel of the respective parties and submitted to the Court for decision, the Court now finds the following facts:

I.

That each and all of the statements and allegations contained in paragraph I of plaintiff's complaint in this action are true.

II.

That each and all of the statements contained in paragraph II of the plaintiff's complaint in this action are true.

III.

That the plaintiff, United States of America, is now and was at all the times mentioned in plaintiff's complaint, the absolute owner by title in fee simple of each and all of the lands and premises described in said complaint and is now and was at all times mentioned in said complaint entitled to the free, full and undisturbed possession of said lands and premises and each and every part thereof.

IV.

That the defendant, George Erkel, does not now, nor did he or his grantors or predecessors in interest, or either or any of them, at the time of the commencement of this action, or at any of the times mentioned in the complaint, or answer and counterclaim of said defendant herein, or at any other time or at all, either by or through the alleged decrees, instruments, documents and acts mentioned in the said pleading of defendant herein and by him designated as answer and counterclaim, or by or through either or any of said decrees, instruments, documents and acts, or otherwise or at all, own or have any right, title or interest in or to the lands and premises mentioned in said complaint, or any part thereof; that said defendant has not now, nor did he or any of his grantors or predecessors in interest, at the time of the commencement of this action, or at any of the times mentioned in the pleadings in this action, or at any other time or at all, either by or through the decrees, instruments, documents and acts mentioned in pleading of said defendant herein designated by him as an an-

swer and counterclaim, or by or through either or any of said decrees, instruments, documents or acts, or otherwise or at all, have any right whatever in or to the possession of the land and premises described in said complaint or in or to any part thereof; that the possession of said premises and of each and every part thereof by said defendant was at all times and now is unlawful and without right as against said plaintiff.

And the Court finds as a conclusion of law that plaintiff is entitled to judgment against said defendant, ejecting and removing the said defendant from the said lands and premises described in said complaint and from the whole thereof, and for costs of suit.

Let judgment be entered accordingly.

OLIN WELLBORN,
Judge of the District Court.

Dated this 27th day of April, 1908.

[Endorsed]: No. 1258. In the Circuit Court of the United States for the Southern District of California. United States of America, Plaintiff, vs. George Erkel, Defendant. Findings of Fact. Filed Apr. 27, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

[Judgment.]

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

No. 1258.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE ERKEL,

Defendant.

This action coming on regularly on the 2d day of March, 1908, for the hearing and trial by the Court, without a jury, a trial by jury having been heretofore expressly waived in open court, and said waiver having been entered upon the minutes of said court, Oscar Lawler, Esq., United States Attorney for the Southern District of California, appearing for and on behalf of plaintiff and Sidney Dell, Esq., appearing for the defendant, and the trial having been proceeded with on said 2d day of March, 1908, and on the following 3d day of March, 1908, and oral and documentary evidence having been introduced on the part of the plaintiff, and the defendant having offered no evidence, and the evidence having been closed, and the cause having been on said 3d day of March, 1908, submitted to the Court for its consideration and decision, and after due deliberation thereon, the Court having delivered its findings and

decision in writing, which is filed, and ordered that judgment be entered in accordance therewith,

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that the United States of America, the plaintiff herein, have and recover of and from George Erkel, the defendant herein, the possession of all that certain land described in the complaint which said land is situate in the County of Los Angeles, State of California, and is particularly described as follows, to wit: Commencing at a stone marked "U. S." on San Pedro Bay and running south seventy (70) degrees, seven (7) minutes, west twenty and ninety-four one-hundredths (20.94) chains to a stone marked "U. S."; thence north nineteen (19) degrees, twenty-two (22) minutes, west four and ninety-seven one-hundredths (4.97) chains to a point sixteen and twenty-nine one-hundredths (16.29) chains due north from the intersection of sections Nineteen (19) and Thirty (30) of Township five (5) South, Range Thirteen (13) West, and Sections Twenty-four (24) and Twenty-five (25) of Township Five (5) South, Range Fourteen (14) West, San Bernardino Meridian; thence North Nineteen (19) degrees, twenty-two (22) minutes, west fifteen and eighty-two one-hundredths (15.82) chains to a stone post with illegible marks; thence north seventy (70) degrees eighteen (18) minutes, east twenty-one and five one-hundredths (21.05) chains to the shore of San Pedro Bay; thence with the meanderings of the shore of San Pedro Bay to the place of begin-

ning, and that said plaintiff further have and recover of and from said defendant, George Erkel, its costs in this behalf taxed at $———.

Judgment entered April 27th, 1908.

WM. M. VAN DYKE,
Clerk.
By Chas. N. Williams,
Deputy.

[Endorsed]: No. 1258. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. United States of America vs. George Erkel. Copy Judgment. Filed Apr. 27, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

[Clerk's Certificate to Judgment-Roll.]

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Southern District of California, Southern Division.

No. 1258.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
GEORGE ERKEL,
Defendant.

I, Wm. M. Van Dyke, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Southern District of California, do hereby certify the foregoing to be a true copy of the Judgment entered in the above-entitled action, and recorded in Judgment Book No. 1, of said Court for the Southern Division, at page 599 thereof, and I further certify

that the foregoing papers, hereto annexed, constitute the Judgment-roll in said action.

Attest my hand and the seal of said Circuit Court, this 27th day of April, A. D. 1908.

WM. M. VAN DYKE,
Clerk.
By Chas. N. Williams,
Deputy.

[Endorsed]: No. 1258. In the Circuit Court of the United States, Ninth Judicial Circuit, for the Southern District of California, Southern Division. United States of America vs. George Erkel. Judgment-roll. Filed April 27th, 1908. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Recorded Judgment Register Book No. 1, page 599.

[Trial—March 2, 1908.]

At a stated term, to wit, the January Term, A. D. 1908, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom, in the City of Los Angeles, on Monday, the second day of March, in the year of our Lord one thousand nine hundred and eight. Present: The Honorable OLIN WELLBORN, District Judge.

No. 1258.

UNITED STATES OF AMERICA,
Plaintiffs,
vs.
GEORGE ERKEL,
Defendant.

This cause coming on this day to be tried before the Court sitting without a jury, a jury having been expressly waived by the agreement in open court of counsel for the respective parties, Oscar Lawler, Esq., United States Attorney, appearing as counsel for the Government, and Sidney Dell, Esq., appearing as counsel for defendant, and Oscar Lawler, Esq., United States Attorney, of counsel as aforesaid for the Government, having offered in evidence a certified copy of an original document certified to December 22, 1904, by the Recorder of the General Land Office (1); a Diseno del Rancho de los Palos Verdes (2); a certified copy of a patent of the Rancho los Paĺos Verdes (3); a certified copy of a plat of the Rancho los Palos Verdes (4); and certified copies of the Expediente, Decision of the Dictrict Court and Field-notes in the matter of the survey of Rancho los Palos Verdes (5); which are objected to by counsel for defendant, and the objection being overruled, are admitted in evidence, and marked respectively Plaintiffs' Exhibits 1, 2, 3, 4, and 5; to which ruling counsel for defendant notes and is allowed an exception which is hereby entered herein, and plaintiffs having called as a witness H. H. Burton, who is duly sworn and gives his testimony, and having offered in evidence a certain blue-printed map of San Pedro Military Reservation, which is admitted in evidence and marked Plaintiffs' Exhibit 6, and having called as a witness A. A. Fries, who is duly sworn and gives his testimony and plaintiffs having rested and a stipulation having been entered into by counsel as to a certain road across the reservation, and defendant

having rested, now, at the hour of 12 M. it is ordered that said cause be and the same hereby is continued until the hour of 2:00 o'clock P. M. of this day for further hearing and argument.

[Trial (Resumed)—March 2, 1908.]

At a stated term, to wit, the January Term, A. D. 1908, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom, in the City of Los Angeles, on Monday, the second day of March, in the year of our Lord one thousand nine hundred and eight. Present: The Honorable OLIN WELLBORN, District Judge.

No. 1258.

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

GEORGE ERKEL,

Defendant.

This cause now coming on for further hearing and argument before the Court, Oscar Lawler, Esq., appearing as counsel for plaintiffs, and Sidney Dell, Esq., appearing as counsel for defendant, and said cause having been argued by counsel for the respective parties and submitted to the Court for its consideration and decision, it is by the Court ordered that said cause be and the same hereby is continued until Tuesday, March 3d, A. D. 1908, at 10:30 o'clock A. M.

[Trial (Resumed)—March 3, 1908.]

At a stated term, to wit, the January Term, A. D. 1908, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom, in the City of Los Angeles, on Tuesday, the third day of March, in the year of our Lord one thousand nine hundred and eight. Present: The Honorable OLIN WELLBORN, District Judge.

No. 1258.

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

GEORGE ERKEL,

Defendant.

This cause having heretofore been submitted to the Court for its consideration and decision and continued until this day for said decision; Oscar Lawler, Esq., United States Attorney, being present as counsel for the plaintiffs, and Sidney Dell, Esq., being present as counsel for defendant; and counsel for plaintiffs as aforesaid having suggested that there was some uncertainty as to a trial by jury having been properly and formally waived in said cause, thereupon, by oral consent of counsel for both parties, now, in open court, a jury is waived, which said waiver is now entered in the Minutes by special leave of the Court; and Sidney Dell, Esq., of counsel, as aforesaid, for defendant, having applied to the Court for leave to present a further argument, on

behalf of the defendant, and said leave being granted, and said counsel for defendant having presented his said argument and said cause now being submitted to the Court for its consideration and decision, it is ordered by the Court that judgment be entered herein in favor of plaintiff and against said defendant; and the United States Attorney is directed to prepare and present to the Judge of this court for his signature Findings accordingly; it is further ordered that the requested Findings of fact requested on behalf of defendant be, and they hereby are refused, to which ruling of the Court the defendant by his said counsel notes and is allowed an exception, which is hereby entered herein.

[Order Extending Time to Prepare, etc., Bill of Exceptions and Entering Exception to Findings, etc.]

At a stated term, to wit, the January Term, A. D. 1908, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom, in the City of Los Angeles, on Friday, the first day of May, in the year of our Lord one thousand nine hundred and eight. Present: The Honorable OLIN WELLBORN, District Judge.

No. 1258.

UNITED STATES OF AMERICA,
Plaintiffs,

vs.

GEORGE ERKEL,
Defendant.

On motion of Sidney Dell, Esq., of counsel for defendant, and good cause appearing therefor, and there being no opposition thereto, it is ordered that said defendant have until and including June 1st, 1908, within which to prepare, serve and file a bill of exceptions herein; it is further ordered that an exception on behalf of defendant be, and the same hereby is, entered, to the findings and the judgment of the Court, this exception being now entered nunc pro tunc as of April 27, 1908, the date of the filing of the findings.

In the Circuit Court of the United States, for the Ninth Circuit, Southern District of California, Southern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE ERKEL,

Defendant.

Bill of Exceptions.

Be it remembered, that on the 2d day of March, 1908, the above-entitled cause came on regularly for trial before the Honorable Olin Wellborn, Judge of said court, sitting without a jury, a jury having been waived in open court by the respective parties, Oscar Lawler, United States Attorney, for the Southern District of California, appearing as attorney for plaintiff, and Sidney Dell, as attorney for defendant, and thereupon the plaintiff, to sustain the issues upon its part, offered the following evidence:

[Evidence Offered upon the Part of Plaintiff, etc.]

A copy, duly certified by the proper officer of the General Land Office of the United States, of the original petition of Jose Loreto Sepulveda and Juan Sepulveda, May 29, 1846, directed to Pio Pico, Constitutional Governor of the Department of the Californias, then subject to the jurisdiction of the Republic of Mexico; together with copy, similarly certified, of the approval of said petition, and a grant to said Jose Loreto and Juan Sepulveda of the tract known as Los Palos Verdes, and the decree of juridical possession to and in favor of Jose Loreto Sepulveda and Juan Sepulveda.

Defendant objected to said petition and grant without the production of the Plan or diseno recited therein. Whereupon plaintiff offered in evidence a blue print copy of a Plan or diseno purporting to be a plan or diseno of said Palos Verdes Rancho and thereupon said objection was withdrawn and all of said documents, including said Plan or diseno, were admitted in evidence; the first named marked U. S. Exhibit 1, and the last named U. S. Exhibit 2. So much of said petition, grant and plan and of the act of juridical possession as is material to the questions involved in said action is as follows:

The petition of said grantees, Jose L. and Juan Sepulveda, for said grant was dated at Los Angeles, May 29, 1846.

It recites that "It is about 19 years since the tract of Palos Verdes towards the EMBARCADERO was granted to us provisionally. This grant is proven

by the subjoined documents which we present in 14 sheets together with the Plan; and since that period we have kept the premises stocked WITH CATTLE AND HORSES in sufficient number."

Whereupon, on June 3, 1846, Governor Pio Pico entered an order, as follows: "In view of the petition wherewith these proceedings originate, proof having been taken that all matters alleged by the petitioners are founded in justice * * * , in the exercise of the powers wherewith I am invested, in the name of the Mexican Nation * * * I hereby declare by these presents letters the Senores Jose Loreto Sepulveda and Juan Sepulveda, brothers, owners in absolute property of the tract known by the name of Los Palos Verdes. Let the appropriate title be issued to the parties in interest." This document was marked filed Nov. 1, 1852, by Geo. Fisher, Secretary of the Land Commission.

The provisions of the said grant, issued and dated June 3, 1846, material to the issues in this action, are as follows:

"In the name of the Mexican Nation, I do now by decree of this date grant unto them the ownership thereof (Los Palos Verdes Rancho) * * * under the following conditions:

(1) They may enclose it, WITHOUT PREJUDICING the cross-roads, highways and right of way. * * *

(2) They shall request the competent magistrate to give them juridical possession by virtue of the Patent. Such magistrate shall assign the proper landmarks.

(3) The tract hereby granted is that shown by the Plan filed with the minutes of the proceedings. * * *

(4) They shall leave free on the tract of San Pedro 500 yards in each direction of the four cardinal points. Neither shall they have power to prevent the persons who traffic at the Port of San Pedro from Using Water And: Pasturage."

The statements in the act of juridical possession by Alcalde Cota, material to the issues herein, are as follows:

"Next afterwards I, the undersigned Judge, sent notice to the owner of the neighboring lands informing him that I was to REMEASURE the tract of Los Palos Verdes * * * and he not having shown any exceptions the same is noted in the minutes."

"Immediately afterwards * * * I caused to be measured a line 100 varas in legnth * * and after observations and calculations, the line was drawn under my direction on a westerly course * * 12,000 varas, which ended at some sand hills on the edge of the beach * * from this point, the second measurement * * towards the south * * 5300 varas * * at a place called EL CODO.

From this place and on an easterly course, the third measurement was, now, leaving a reserve of 500 varas on each side of the four cardinal points for the uses of the superior government, and the measurement continuing to the place called Goleta, the result was 15,000 varas, which ended at said spot, where a landmark was ordered placed. From this spot and in a

northerly direction the fourth measurement was run, and there were counted 8,000 varas which ended at the place of beginning."

"Filed in office Nov. 1, 1852. Geo. Fisher, Secry."

The said Plan or diseno (marked U. S. Exhibit 2) of said Palos Verdes Rancho showed the seashore of the Pacific Ocean as the exterior boundary line of said Rancho from EL CODO easterly and around the peninsula to the place called La Goleta. It does not show thereon the "Government Reserve" mentioned in the said grant dated June 3, 1846, and in said act of juridical possession, and described in the U. S. patent for said Rancho as being located between said Points EL CODO and Goleta.

Upon said diseno or Plan were the following entries: In the lower right-hand corner the legend:

"DISENO

DEL RANCHO DE LOS

PALOS VERDE."

In the upper right-hand corner, the following:

"NO. 398

Manuel Dominguez, et al.,

San Pedro Expediente."

"Filed in office April 6, ~~1856~~ 1854, Geo. Fisher, Secretary."

On the left margin, the following entry: "Rancho de Los Palos Verdes (Diseno), General Land Office Dec. 1902."

Said Plan or diseno purports to be a topographical and outline map of Los Palos Verdes Rancho. It

shows the Pacific Ocean as the boundary thereof on the west, south and east.

The United States next offered, and there was received in evidence, and marked Plaintiff's Exhibit 3, a duly certified copy of patent issued by the United States of America to and in favor Jose Loreto Sepulveda and Juan Sepulveda, of date the 22d day of June, 1880, so much of said patent as is pertinent hereto being as follows, to wit:

"Whereas, it appears from duly authenticated transcript filed in the General Land Office of the United States that pursuant to the provisions of the Act of Congress, approved the 3d day of March, ANNO DOMINI, one thousand eight hundred and fifty-one, entitled 'An Act to ascertain and settle the Private Land Claims in the State of California, Jose Loreto Sepulveda and Juan Sepulveda, as claimants, filed their petition * * * in which * * they claimed the confirmation of their title to a tract of land known by the name of Los Palos Verdes, situate in the then county of Los Angeles and State aforesaid, said claim being founded on a Mexican grant to the petitioners made on the third day of June, A. D. one thousand eight hundred and forty-six, by Pio Pico, then constitutional Governor of the Department of the Californias:

AND WHEREAS, the Board of Land Commissioners * * * rendered a decree of confirmation in favor of the claimants, which decree or decision having been taken by appeal to the United States District Court for the Southern District of Califor-

nia, the said Court in the cause entitled 'Jose Loreto Sepulveda and Juan Sepulveda vs. The United States,' rendered its decree as follows, to wit:

'At Dec. Term, 1856.

'This cause coming on to be heard on appeal from the decision of the Board of Land Commissioners * * *

'It is ordered, adjudged and decreed that the decision of said Board be, and the same is hereby, affirmed, and that the title of the said Jose Loreto Sepulveda and Juan Sepulveda * * * is a good and valid one.

'The land of which confirmation is hereby made is that known by the name of Los Palos Verdes, situate in the County of Los Angeles, and is bounded and described as follows:

'Beginning at the southeast point of the Place Los Palos Verdes at a place called La Goleta, where there is a landmark and running in a northerly direction, eight thousand varas, thence running in a westerly course twelve thousand varas to some sandhills on the edge of the beach, where there is a landmark; thence running south five thousand varas to a point on the beach called El Codo, thence running on an easterly course leaving a reserve of five hundred varas on each of the four cardinal points fifteen thousand varas to the place of beginning. Reference being had for further description to the grant of said lands made by Pio Pico, dated June 3d, 1846, to Jose L. and Juan Sepulveda * * * and to the Act of Juridical possession of said lands * * * which

said grant and Juridical possession are filed in this case," * * *

Said decree was rendered at the December * * * Term, 1856, of said court. And thereafter the proceedings of court upon title became final.

The said patent sets out in full the survey thereof made in Dec., 1859, under said decree. It recites: "Whereas, there has been deposited in the General Land Office of the United States a return with the descriptive notes, certificates of advertisement and plat of the survey of the said claim, confirmed as aforesaid, authenticated by the signature of the United States Surveyor General for the State of California, which descriptive notes, certificates of advertisement and plat of survey are in the words and figures as follows, to wit:

'Under and by virtue of the provisions of the 13th section of the Act of Congress of the third of March, 1851, * * * whereas the U. S. District Court for the Southern District of California rendered a decision whereby it recognized and confirmed the title and claim of Jose Loreto Sepulveda and Juan Sepulveda to the tract of land designated as Rancho Los Palos Verdes * * * the said tract of land was surveyed in conformity to the grant thereof and to the said decision * * * and I hereby certify that the accompanying map is a true and accurate plat of the said tract of land as appears by the field-notes of the survey thereof, made by Henry Hancock, Deputy Surveyor, * * * The boun-

daries of said tract are described in the words and figures following, to wit:

"Beginning at a point on the shore of the Pacific Ocean at Station number 18 of the Rancho San Pedro and running thence * * * along high-water mark on the Sea Beach":

"Thence" (by various courses and distances from said point designated as Station *1*) to various stations numbered from *1* to 157 inclusive; Station No. 77 being at El Codo, described in said act of juridical possession.

"Thence south * * * to Station 158.

"Thence east * * * to station on top of high bank.

"Thence" (by various courses and distances) to stations numbered 159 to 165 inclusive.

"Thence north * * * to station 166 at a point seventeen chains and sixty-seven links south of the quarter section corner on the west boundary of section thirty, township five south, range thirty west."

"Thence" (by various courses and distances) to various stations numbered from 167 to and including station 185;

"Station 186"; Thence north 35 degrees east, 1.54 chains to a rock monument at the southeast corner of the Government Reserve, 500 varas square, excluded by the grant and juridical possession.

"Station 187; Thence south 70 degrees west 20.22 chains to a station at the rock monument at the southwest corner of the reserve.

"Station 188; Thence north 20 degrees west 21 chains to station at northwest corner of the reserve at a rock monument.

"Station 189; Thence north 70 degrees east 20.23 chains to station at the rock monument at the northeast corner of the reserve on the top of a perpendicular bluff;

"Thence" (by various courses and distances) from said station 189 to stations numbered from 190 to 244, inclusive, and to station No. 1, the place of beginning. * * *

'In testimony whereof, I have hereunto signed my name officially and caused my seal of office to be affixed this fifth day of May, A. D. one thousand eight hundred and eighty.

'THEO WAGNER,
U. S. Surveyor General for California.

'I hereby certify that by virtue of the provisions of the Act of Congress approved 1st July, 1864, * * * notice of the plat and survey having been made of the Rancho Los Palos Verdes in Los Angeles county, finally confirmed to Jose Loreto Sepulveda, * * * surveyed by Henry Hancock, U. S. Deputy Surveyor, in Sept., 1859, has been advertised in accordance therewith. * * *

'J. R. HARDENBURGH,
U. S. Surveyor General for California."

(Also certificate, similar to the foregoing, of date September 18, 1874, by James T. Stratton, U. S. Surveyor-general for California.)

"Now KNOW YE, That the United States of America, in consideration of the premises and pur-

suant to the provisions of the Act of Congress aforesaid * * * HAVE GIVEN AND GRANTED, and by these presents DO GIVE AND GRANT, unto the said Jose Loreto Sepulveda and Juan Sepulveda, their heirs and assigns, the tract of land embraced and described in the foregoing survey, but with the stipulation that in virtue of the fifteenth section of said act, neither the confirmation of this claim nor this patent shall affect the interest of third persons. * * *

By the President: R. B. HAYES,
By WM. H. CROOK, Secretary."

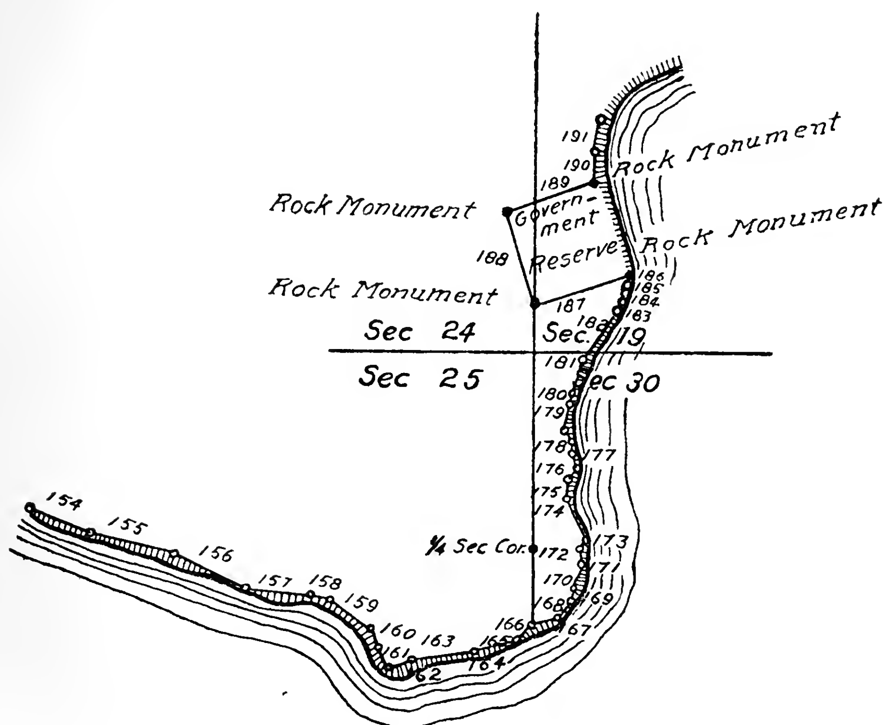
The Government then offered, and there was received in evidence, the plat referred to in the certified copy of patent marked "Exhibit 3" above set forth, duly certified to as being a correct copy of the plat of the Rancho Los Palos Verdes, finally confirmed to Jose Loreto Sepulveda, et al.;

From which said map or plat it appears that the line described and indicated by the description shown and recited in said certified copy of patent, Exhibit 3, commencing at station No. 1, therein mentioned, and extending by various course and distances to and through stations numbered from said station No. 1 to station 158, inclusive—extends along the shore line of the Pacific Ocean and the inner bay of San Pedro on said Pacific Ocean; that from said station 158, mentioned and designated in said patent and shown on said map, the said line, and the several stations thereon indicated to and including station 186, extends along, and said stations are situated on the top of a high bank or bluff, at the base of

which extends the high-water line, extending from station 166 to and including station 186, is a substitute meander line run in lieu and place of the high-water line at the base of said high bank or bluff.

That from said station 186, on the top of said bank as aforesaid, said map shows a white space marked "Government Reserve," and being the land described in the complaint in this action, particularly described in the copy of a part of the said plat or map of said Rancho Palos Verdes hereunder set forth, extending to a point marked on said map "Rock Monument 189"; that from said station 189, said so-called substitute meander line proceeds by various courses and distances along the top of said high bank or bluff to station 196, where said line descends to the actual high-water mark and extends along said high-water mark to and including station 238, where said survey leaves the Ocean line and extends inland. Said map at station No. 209 of said survey shows the point or place called Goleta in the act of juridical possession of said Alcalde Cota hereinbefore set forth. A copy of a portion of the said plat of Rancho Los Palos Verdes including said "Government Reserve" and extending from station 154 to station 191, inclusive, is hereto annexed, as follows:

[Copy of a Portion of a Map of the Rancho Los Palos Verdes.]



Plaintiff, the United States, then offered, and there was received in evidence and marked U. S. Exhibit 5, copies, duly certified by the proper officers of the General Land Office, of the following documents:

(1)

Expediente, grant and conveyance of the original grant to Jose Antonio Carrillo and Abel Stearns, and of the conveyance from said Carrillo to said Stearns, and from said Stearns to David W. Alexander and Juan Temple;

(2)

Decision of the District Court of the United States for the Southern District of California.

(3)

Field-notes and descriptive notes of the above claim.

(4)

Field-notes of Henry Hancock's survey of the Rancho Los Palos Verdes, so far as embraced between stations 160 and 200.

The tract thereby granted (as shown upon plat of H. H. Burton hereinafter described) contained 1.77 acres in square form (100 varas square) and is located inside what is established as the "Government Reserve" near its southeast corner. Its front southeast corner is 80 feet west of high tide line of the Pacific Ocean, and its northeast corner is 100 feet west thereof. The grant of said tract is dated June 25, 1845.

Said expediente, grant and conveyances, so far as the same are pertinent hereto, being as follows:

"Senor Commandant General of Alta, California: Jose Antonio Carrillo and Abel Stearns * * * Before Your Excellency * * * we present ourselves soliciting that in view of the protection and other advantages which may be given to commerce, and that we may be permitted to build a house in the Port of San Pedro * * * we supplicate * * *

that you deign to extend to us for this 100 varas square of land as such. * * *

"Pueblo of Los Angeles 8th of March, 1834.

"JOSE ANTONIO CARRILLO,
"ABEL STEARNS.

"Angeles March 10th, 1834. The license solicited is extended as asked to build a house and such other edifice as may be convenient in the place that accommodates them in the Port of San Pedro, designating for that purpose an area of (100) veras square.

FIGUEROA."

"* * * Copy of Jose Antonio Carrillo conveyance to Abel Stearns of the property of San Pedro.

"Let it appear * * * that * * * we have agreed that the permission which the commanding General conceded to us of date 11th March of the present year, that we might at a fixed certain place build on the land in the Bay of San Pedro, with the premium of one hundred varas square at a point that suited us; I declare * * * that from this day the indicated grace is only applicable to the said Stearns * * * who will be able without my consent to proceed with the property * * *."

"Filed in Office April 10th, 1854.

GEO. FISHER, Secy."

"Translation of Deed of Conveyance from D. Abel Stearns to David W. Alexander and Juan Temple of the property at San Pedro.

"In the City of Our Lady of the Angeles on the 28th day of June, A. D. 1845, before me, First Alcalde and Judge of the 1st Instance * * * appears Abel Stearns resident of this municipality and

said, that for himself and in the name of his heirs, successors, and who of them might have title * * * he sells and gives in real sale, and perpetual alienation, to Messrs. David W. Alexander and John Temple, both residents of the same place, and their representatives, the house and lot that belong to him, situated near the edge of the shore or landing of the Port of San Pedro * * *

"(Signed) ABEL STEARNS.

"Field-notes of the final survey of the Rancho Palos Verdes * * * surveyed by Henry Hancock, Deputy Surveyor, under instructions, * * * of date September 1, 1858. From station 160 of said survey to and including station 200 thereof," showing station 160, and thence by various courses and distances from said last mentioned station to and through stations numbered 161 to 185, inclusive;"

"(186) Thence N. 35 E. 1.54 to a rock monument marking S. E. corner of the Government Reserve of 500 varas square, formerly excluded by grant and juridical possession with assent of claimants, at this time excluded from final survey;

"(187) S. 70″ W. 20.22 to a rock monument marking the S. W. corner of reserve at a rock monument;

"(188) N. 20″ W. 21.00, to the N. W. corner of same at a rock monument;

'(189) N. 70″ E. 20.23, to a rock monument at the top of a perpendicular bluff and nearly on a line of high-water mark."

[Witnesses, etc., Introduced in Behalf of Plaintiff.]

Plaintiff also introduced witnesses in its behalf as follows:

AMOS A. FRIES, Captain Corps U. S. Engineers, who testified that he had been in charge of the San Pedro Military reservation (the premises in controversy), for about two years, and, during that time, had observed that the tendency of the sea was to encroach upon the land on the front of the reservation.

Also H. H. BURTON, who testified in substance that he was a civil engineer, and as such, while in the employ of the United States, he surveyed in June, 1904, the San Pedro Military reservation and made a plat thereof. He found that the corner rock monument at the southeast corner of the "reserve" described in the field-notes of the survey set out in the U. S. Patent for the Rancho Palos Verdes had been washed away. He relocated it, as shown on his said plat, 1348 feet easterly from the southwest corner rock monument. He had shown upon that plat the house of defendant Erkel under the bluff. Upon cross-examination, the witness was unable to give any particular reason for relocating the southeast corner rock monument 1348 feet from the southwest corner rock monument, instead of 20.22 chains therefrom as set out in the field-notes of survey in said U. S. patent, except that he was governed by the high tide line. He testified that he found an old public road running through the northeasterly part of the "reserve" down to the landing place at high tide in

front thereof. It ran down a gully as shown upon his plat of that survey. The houses of defendant Erkel were between the high tide line of the ocean and a straight line connecting the front corner rock monuments, and were north of that public road. Counsel for the plaintiff here admitted, in behalf of the defendant, that said road was a public highway at the date of the grant in 1846, and prior thereto at the time, in 1836, when Richard H. Dana loaded vessels with hides at that place, and in 1847 when Commodore Stockton landed U. S. troops at that place.

The plat identified by H. H. Burton was put in evidence by plaintiff and is marked Exhibit 6. It shows the south line of said reserve extending 1348 feet from the southwest corner rock monument of said "reserve" to the southeast corner rock monument as relocated by him; his said line being run on a course south 69 degrees 58 minutes west. Said southeast corner rock monument is, according to this plat, relocated 17 feet distant westerly from the high tide line of the Pacific Ocean. The distance from the N. E. corner rock monument is shown on the plat to be 140 feet distant from and above said high tide line to said northeast corner rock monument. Said north line is run on a course north 70 degrees 48 minutes east, and shows 1331 feet between the N. W. and N. E. corner rock monuments. By said plat the high tide line of the Pacific Ocean is 17 feet from the relocated rock monument, and diverges thence steadily easterly from a straight line connecting the front corner rock monuments until it is 140 feet distant

from the N. E. corner rock monument of the "reserve." Between these two lines, under the high bluff, are the premises in controversy occupied by defendant Erkel, with his houses in the northerly part thereof. The plat shows the distance in 1904 from S. W. corner rock monument to edge of bluff to be 1335 feet. The area of the "reserve" is given on this plat exclusive of the grant to Temple and Alexander, at 41.2 acres. It also shows an area of 38 acres of tide flats in front of the military reservation as belonging to the United States under the Act of the State of California in 1897.

Said map shows, at the southeast corner of the "reserve," a cross-mark with the legend "Position of rock monument (now gone) referred to on Patent Map 1859," at southwest corner of the "reserve," a small circle with the legend "Southwest corner. Stone partly buried, marked 'U. S.' very faint"; and also shows a line drawn from said circle marked "S. W. corner, etc.," to a circle marked "Northwest corner. Stone partly buried. No marks," which line bears legend "S. W. corner to N. W. corner 1375.3 ft. N. 19 degrees 31′ W"; and from said last mentioned northwest corner said map shows a line drawn and extending to a small circle some distance above heavy line marked "High water line," which circle is designated "N. E. corner. Stone partly buried. Marks obliterated," said line from said northwest corner to said northeast corner bears the legend "From stone at northwest corner to stone at northeast corner 1331 feet, N. 70 degrees 48′ E." Said map also shows

said north line extended in an easterly direction 140 feet according to its scale to said high-water mark, which said line bears the following legend "North boundary of grant from State to United States N. 84 degrees 18′ E. to point 300 yards beyond low-water mark." Said map also shows a line extending said south line of the "reserve" from the southwest corner monument as relocated to high-water mark and beyond, said line bearing the legend "South boundary of grant from State to United States N. 89 degrees 53′ E. to a point 300 yards beyond low-water mark."

Also shows a rectangular space 277.9 feet square marked "Claim of Juan Temple and D. Alexander"; located in southeast corner of said "reserve." Also shows 2 railroad lines extending across and along the waterfront of said tract of land in the complaint described, in front of said rectangular space marked "Claim of Juan Temple and D. Alexander," and above and back of the edge of bluff, except at one point near the southeast corner of said tract of land, where it shows the tracks of the railroad have been washed out by the encroachment of the waters of San Pedro Bay.

The said map, offered in evidence by the Government and marked "U. S. Exhibit 6," had the following legend thereon:

"San Pedro Military Reservation, California. Area of Reservation to high water line of 1904, exclusive of claim of Temple and Alexander 41.2 acres. The area beyond high-water line conveyed by State to United States about 38 acres in 1897.

"Note: By Act of the Legislature of the State of California, March 9, 1897, the title of the State to an area along the front of this reservation 900 feet wide measured from the low-water line was ceded by the State to the United States. The north and south boundaries of this area are indicated.

"U. S. Engineer Office. Los Angeles, Cal. November 20, 1905. To accompany report of this date.

"C. H. McKINSTRY,

"Captain, Corps of Engineers, U. S. A.

"Survey by H. H. Burton, Superintendent, June 21, 1904."

Said blue-print shows a rectangular space, conforming to the copy of part of said Palos Verdes Rancho herein set out, bounded on the east by the Bay of San Pedro, and being the same property described in the complaint in this action. Said blue-print shows along the front of said space, and on the easterly side thereof, a heavy line designated "High-water line," and various lighter lines approximately parallel thereto, showing the elevation of the land back of said high-water line until a line is reached marked "Edge of Bluff," shown by said map to be 55 feet above mean low water.

Said blue-print further shows at the southeast corner of the land thereon indicated, a cross-mark with the legend "Position of rock monument (now gone) referred to on Patent Map 1859"; and at the southwest corner of the land thereon shown, a small circle with the legend "Southwest corner. Stone partly buried, marked 'U. S. very faint,'" and further shows a line drawn from said cross-mark above re-

ferred to to the said small circle, with the legend thereon: "From stone at S. W. corner to edge of bluff in 1904, 1325 feet; said blue-print further shows a line drawn from said circle, marked "S. W. corner, etc.," to a circle marked "Northwest corner. Stone partly buried. No Marks," which line bears legend "S. W. corner to N. W. Corner 1375.3 feet. N. 19 degrees 31′ W.," and from said last-mentioned northwest corner said map shows a line drawn and extending to a small circle a short distance (140 feet) above said heavy line marked "High-water line," which circle is designated "N. E. Corner stone partly buried. Marks obliterated," and which said line from said northwest corner to said northeast corner bears the legend "From stone at northwest corner to stone at northeast corner 1331 feet. N. 70 degrees 48′ E." Said blue-print further shows a line extending approximately in an easterly direction from the point where the prolongation of the line from the northwest corner to the northeast corner of said tract of land strikes said high-water line, which said line bears the following legend, "North boundary of grant from State to United States N. 84 degrees 18′ E. to a point 300 yards beyond low-water mark"; and said blue-print also shows a line approximately parallel to the line last referred to, extending from a point where the prolongation of the line extending from the southwest corner monument to the said cross indicated thereon, "Position of 'Rock Monument' (now gone) referred to on patent map, 1859," meets said high-water mark, said line bearing the legend "South boundary of grant from State to

United States N. 89 degrees 53′ E. to a point 300 yards beyond low-water mark";

Said blue-print also shows a rectangular space 277.9 feet square marked "Claim of Juan Temple and D. Alexander"; said blue-print also shows 2 parallel lines extending across and along the water-front of said tract of land in the complaint described and in front of the rectangular space marked "Claim of Juan Temple and D. Alexander," and above and back of the line marked on said blue-print "edge of Bluff," except at one point near the southwest corner of said tract of land, where said plat shows the tracks of a railroad to have been washed out by the encroachment of the waters of the Pacific Ocean at San Pedro bay.

Said blue-print further shows the location of two buildings, marked, respectively, "George Erkel's House" and "Outhouse," situate immediately in front and to the east of an imaginary line drawn from the said stone monument, on the top of said high bluff or bank, marked "Northeast corner. Stone partly buried, Marks obliterated," to the point marked "Position of Rock Monument (now gone) referred to on patent map (1889)," and between said last-mentioned imaginary line and the high-water line of the Pacific Ocean at said San Pedro bay.

[Recitals Relative to Evidence, Testimony, Submission, etc.]

The foregoing is all the evidence material to the issues in said action, taken on the trial thereof.

The plaintiff offered no further testimony and defendant introduced no evidence other than said admission of plaintiffs' attorney as to the public road.

Thereupon, the said cause was argued and submitted and thereafter, to wit, on the 27th day of April, 1908, findings of fact and conclusions of law were duly and regularly signed by me and filed and entered in said case, to which findings of fact and conclusions of law defendant then and there excepted on the ground of the insufficiency of the evidence to justify the same, and the exception was duly allowed.

[Order Allowing, etc., Bill of Exceptions.]

And now that the foregoing matters may be made part of the record in said action, the undersigned Judge of said court sitting at said trial, on request of defendant, George Erkel, by his attorney, Sidney Dell, doth, within the time allowed by law and the further order of said Court, hereby allow, settle and sign the foregoing Bill of Exceptions, and order the same to be filed in said action.

OLIN WELLBORN,

Judge.

[Endorsed]: No. 1258. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. United States of America vs. George Erkel. Engrossed Bill of Exceptions. Filed Jun. 8, 1908. Wm. M. Van Dyke, Clerk.

[Order Overruling Motion for a New Trial.]

At a stated term, to wit, the January Term, A. D. 1908, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom, in the City of Los Angeles, on Wednesday, the third day of June, in the year of our Lord one thousand nine hundred and eight. Present: The Honorable OLIN WELLBORN, District Judge.

No. 1258.

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

GEORGE ERKEL,

Defendant.

Now, comes Sidney Dell, Esq., of counsel for defendant, and moves the Court that defendant's motion for a new trial herein be overruled, defendant having elected not to prosecute said motion for a new trial; whereupon, it is by the Court ordered that said motion for a new trial be, and the same hereby is overruled.

In the Circuit Court of the United States, for the Southern District of California, Southern Division, Ninth Circuit.

No. 1258—LAW.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE ERKEL,

Defendant.

Petition for Writ of Error.

The above-named defendant, George Erkel, conceiving himself aggrieved by the judgment entered against him on the 27th day of April, 1908, in the above-entitled cause, hereby prays the Court for a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and that a transcript of the records and proceedings and papers on which said judgment was made and entered, duly authenticated, may be sent to the said Circuit Court of Appeals of the United States for the Ninth Circuit.

Dated at Los Angeles, Cal., October 22d, 1908.

SIDNEY DELL,

Attorney for George Erkel, Defendant.

[Endorsed]: No. 1258. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. United States of America vs. George Erkel. Petition for Writ of Error. Filed Oct. 22, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

In the Circuit Court of the United States, for the Southern District of California, Southern Division, Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE ERKEL,
Defendant.

Assignment of Errors on Writ of Error.

To the Hon. U. S. Circuit Court of Appeals for Ninth Circuit:

Comes, now, the above-named defendant, George Erkel, plaintiff in error in said above-entitled cause, and assigns errors of the Court upon the record, as follows, to wit:

First. Said Court erred in finding as a fact that said United States of America, plaintiff in said action, was then and there the owner of the premises in controversy claimed by defendant; for the reason that there was no evidence whatever to justify said finding of fact.

Second. Said Court erred in its conclusion of law, upon the evidence submitted, that said plaintiff was entitled to a judgment against said George Erkel, defendant, for the premises in controversy claimed by him; for the reason that the evidence failed to show any title to said premises in said plaintiff and did show it had no title thereto.

Third. Said Court erred in rendering and entering a judgment for said plaintiff, the United States of America, against said defendant for the premises

in controversy claimed by him and for possession of the same; for the reason that there was no evidence whatever to justify or sustain said judgment.

Wherefore, George Erkel, plaintiff in error, respectfully prays the Hon. Circuit Court of Appeals for a reversal of said judgment and for a mandate to said Circuit Court directing a final judgment in favor of the plaintiff in error upon the evidence submitted in said cause in the Court below.

SIDNEY DELL,

Attorney for George Erkel, Plaintiff in Error.

[Endorsed]: No. 1258. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. United States of America vs. George Erkel. Assignment of Errors on Writ of Error. Filed Oct. 22, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

In the Circuit Court of the United States, for the Southern District of California, Southern Division, Ninth Circuit.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE ERKEL,

Defendant.

Order Allowing Petition for Writ of Error and Fixing Amount of Bond.

Upon reading and filing the petition of the said defendant, George Erkel, praying for the allowance of a writ of error in the above-entitled cause return-

able before the United States Circuit Court of Appeals for the Ninth Circuit, and on motion of Sidney Dell, Esq., of counsel for said defendant;

It is ordered that the said petition be, and the same is hereby, allowed and granted and that said writ of error, so allowed be made returnable before the United States Circuit Court of Appeals for the Ninth Circuit on the 21st day of November, 1908, and that a transcript of the proceedings in said cause, as provided by law and duly authenticated, be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

It is further ordered that the amount of the bond to be given by the plaintiff in error be and the same is hereby fixed at $100, as a Cost Bond, and the bond in that amount tendered by the said plaintiff in error with Geo. W. Towne and Geo. M. McKenzie as sureties is hereby approved.

Done at Chambers, this October 24th, 1908.

OLIN WELLBORN,

Judge.

[Endorsed]: No. 1258. U. S. Circuit Court, Southern District of California, Southern Division. United States of America vs. George Erkel. Order Allowing Writ of Error. Filed Oct. 24, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

In the Circuit Court of the United States, for the Southern District of California, Southern Division, Ninth Circuit.

No. 1258—LAW.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE ERKEL,
Defendant.

Bond on Writ of Error.

Know all men by these presents: That we, George Erkel, defendant above named, and Geo. W. Towne and Geo. M. McKenzie, as sureties, are held and firmly bound unto the above-named United States of America in the sum of One Hundred Dollars to be paid to the said United States of America, for the payment of which well and truly to be made we bind ourselves and each of us, our and each of our heirs, executors, administrators and successors jointly and severally, firmly by these presents.

Sealed with our seals and dated the day of October, 1908.

Whereas, the above-named defendant, George Erkel, has prosecuted, and is prosecuting, his writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment given in the above-entitled cause by the said Circuit Court of the United States for the Ninth Circuit, Southern Division, Southern District of California;

Now, therefore, the condition of this obligation is such that if the above-named George Erkel shall prosecute said writ of error to effect and answer any judgment for costs if he shall fail to make his plea good, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

Dated this 24th day of October, 1908.

GEORGE ERKEL,
By S. DELL,
His Atty.
GEO. W. TOWNE.
GEO. M. McKENZIE.

United States of America,
Southern District of California,
County of Los Angeles,—ss.

In person before me, Clerk of the U. S. Circuit Court for the Southern District of California, this day came Geo. W. Towne and Geo. M. McKenzie, known to me to be the persons named in the within Bond on Writ of Error, who, after being duly sworn, deposes and says, each for himself, that he is a resident and freeholder within the State of California and is worth more than twice the sum specified in the within Bond, over and above all his just debts and obligations and liabilities, exclusive of property exempt from execution.

GEO. W. TOWNE,
GEO. M. McKENZIE.

Subscribed and sworn to before me this 24th day of October, 1908.

[Seal] WM. M. VAN DYKE,
Clerk U. S. Circuit Court, Southern District of California.

By Chas. N. Williams,
Deputy.

Approved:

OLIN WELLBORN,
Judge.

[Endorsed]: No. 1258. U. S. Circuit Court, Southern District of California, Southern Division. United States of America vs. George Erkel. Bond on Appeal. Filed Oct. 24, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

[Clerk's Certificate to Transcript of Record.]

In the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Northern Division.

No. 1258.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE ERKEL,
Defendant.

I, Wm. M. Van Dyke, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, do hereby certify the foregoing fifty-three

(53) typewritten pages, numbered from 1 to 53, inclusive, and comprised in one volume, to be a full, true and correct copy of the record pleadings, and of all proceedings and papers upon which the judgment in favor of the plaintiff was made and entered in said cause, and also of the assignment of errors, petition for and order allowing writ of error and bond on writ of error in the above and therein entitled cause and that the same together constitute the return to the annexed writ of error.

I do hereby further certify that the cost of the foregoing record is $38.50, the amount whereof has been paid me by George Erkel, the plaintiff in error in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, this 7th day of November, in the year of our Lord one thousand nine hundred and eight, and of our Independence, the one hundred and thirty-third.

[Seal] WM. M. VAN DYKE,

Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California.

By Chas. N. Williams,

Deputy Clerk.

[Endorsed]: No. 1666. United States Circuit Court of Appeals for the Ninth Circuit. George Erkel, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Southern District of California, Southern Division.

Filed November 9, 1908.

F. D. MONCKTON,
Clerk.

No. 1666.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

George Erkel,
Plaintiff in Error,
vs.
The United States,
Defendant in Error.

WRIT OF ERROR FROM CIRCUIT COURT, DIST. OF SO. CAL. SOUTHERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR.

SIDNEY DELL,
Attorney for Plaintiff in Error.
OSCAR LAWLER,
U. S. District Attorney,
Attorney for Defendant in Error.

Filed this..........day of February, 1909.

..................................*Clerk.*

By..........................*Deputy Clerk.*

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

No. 1666.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

George Erkel,
Plaintiff in Error,
vs.
The United States,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Abstract of the Case.

This case comes up on exception to the findings of fact for defendant in error, the plaintiff below, on the ground that there was no evidence sufficient to justify the findings, i. e., there was no evidence, whatever, to support them.

The case was ejectment, brought by the United States against George Erkel to recover a tract of land

in Los Angeles county. The case was tried by the court, upon an oral waiver in open court under the California Practice, adopted June 1, 1872, by the U. S. R. S., Sec. 914.

Cal. Code, C. P., Sec. 631:

"Trial by jury may be waived by the several parties to an issue of fact in actions * * * for the recovery of specific real * * * property * * * in manner following: * * *

"3. By oral consent, in open court, entered in the minutes."

This makes the trial a judicial act and reviewable. See

21 How. 223 Campbell v. Boyreau (p. 227):

"The Act of Congress of May 26, 1824, * * * adopted the practice of the state courts [of Louisiana] in the courts of the United States. * * * And, as by the laws of Louisiana, the facts, by consent of the parties, may be tried and found by the court, without the intervention of a jury, this court is bound, upon a writ of error, to regard them as judicially determined, * * * and the questions of law which arise are * * * open to revision by this court."

The controversy is over a 3-acre tract of land, called herein the ERKEL STRIP, lying between high tide line of the Pacific ocean on San Pedro bay, and a north and south line connecting the N. E. and S. E. "corner" rock monuments of the "Government Reserve," created by the Mexican grant of June 3, 1846, for Palos Verdes

Rancho; said N. E. corner monument being 140 feet above high tide and the S. E. corner being 32 feet distant from the said high tide line, and the distance between the monuments being 1386 feet or 21 chains, according to the survey set out in the U. S. patent of confirmation. The tract lies under the bluff, where defendant had his home and resided for many years with his family.

The SOLE question in the case is upon the true construction of the U. S. patent, aided by the evidence put in by plaintiff for the purpose of interpreting it. Defendant put in no evidence, except an admission of plaintiff that the Mexican grant reserved a public highway to the landing place at the Port of San Pedro, adjacent to and in front of said "Government Reserve." [Tr. p. 48.]

Plaintiff put in evidence the U. S. patent of confirmation for the Palos Verdes Rancho, containing the field notes of U. S. survey thereof; also the decree of confirmation, which (by reference) incorporated the Mexican grant and disena attached and the Act of Juridical Possession, for FURTHER DESCRIPTION of the premises confirmed; which three last documents plaintiff also put in evidence. [Tr. p. 37.]

The Mexican grant is for the tract known as Los Palos Verdes Rancho, according to the disena attached to the petition of grantees. [Tr. pp. 33, 34.] It is granted,

"Under the following conditions:

"(1) They may enclose it, WITHOUT PREJUDICING the cross roads, highways and right of way. * * *

"(2) They shall request the competent magistrate

to give then juridical possession by virtue of the patent. Such magistrate shall assign the proper landmarks.

"(3) The tract hereby granted is that shown by the plan filed with the minutes of proceedings. * * *

"(4) They shall LEAVE free on the tract of San Pedro 500 varas in each direction of the four cardinal points. Neither shall they have power TO PREVENT THE PERSONS who traffic at the Port of San Pedro from USING WATER and PASTURAGE." [Tr. pp. 33-4.]

The plan, or disena (made prior to the grant to which it is attached and made part thereof) shows the HIGH TIDE LINE of the Pacific ocean (a "Visible Monument," found on the ground) is the EXTERIOR boundary line of Palos Verdes Rancho, adjacent to and in front of the "Reserve." [Tr. p. 35.]

The Act of Juridical Possession sets forth the first and second courses of the survey down "to the beach at a place called EL CODO." It continues:

"From this place and ON AN EASTERLY COURSE, the third measurement was, now, leaving a reserve of 500 varas on each of the four cardinal points for the uses of the superior government, and the measurement continuing to the place called La Goleta, the result was 15,000 varas, which ended at said spot where a landmark was placed." [Tr. p. 34.]

The decree of confirmation condensed and interpreted that description as follows:

"Thence running ON AN EASTERLY COURSE, leaving a RESERVE of 500 varas on each of the cardinal points, 15,000 varas to the place of beginning."

The U. S. survey, set out in the patent, starting at N. W. corner of the rancho, at the "second course" on the beach, is as follows [Tr. p. 39]:

"Beginning at a point ON THE SHORE of the Pacific ocean at Station No. 18 of Rancho San Pedro and running thence * * * ALONG THE HIGH WATER MARK ON THE SEA BEACH:

"Station No. 1, north 88 degrees west, 3.04 chains," etc., with successive numbers until it reaches station 238, where it leaves the ocean and runs inland. At station 158 it encounters a high bluff that prevents running along the ACTUAL high tide line, and, hence, it runs a substitute meander line on the bluff from that point—the high bluff extending past the premises in controversy. Still running on this substitute meander line, the field notes, upon reaching the "Government Reserve," continue as follows:

"Station 186; north 35 degrees east, 1.54 chains to a rock MONUMENT at the southeast CORNER of the Government Reserve, 500 varas SQUARE, excluded by the grant and JURIDICIAL POSSESSION."

"Station 187; thence south 70 degrees west, 20.22 chains to station at the rock MONUMENT at the southwest CORNER of the reserve."

"Station 188; thence north 20 degrees west, 21 chains to station at the northwest CORNER of the reserve at a rock MONUMENT."

"Station 189; thence north, 70 degrees east, 20.23 chains to station at the rock MONUMENT at the northeast CORNER of the reserve on top of a perpendicular bluff."

"Station 190; thence north, 4 degrees 30 minutes west, 6.00 chains to station," etc., upon the meander line. [Tr. p. 39, and copy plat, p. 43.]

Plaintiff also put in evidence a Mexican grant in 1836 to Juan Temple and another [Tr. pp. 43-5] for a tract ONLY 100 VARAS SQUARE, included in the later "reserve" of 500 varas square. [Tr. pp. 50, 53.] The S. E. corner of that tract is 80 feet above high tide and its N. E. corner is 100 feet therefrom, with NO WATER BOUNDARY. It was concededly granted to Temple to promote the cattle trade at the Port of San Pedro.

Captain A. A. Fries, U. S. engineer in charge for two years past, testified to recent encroachments of the sea on S. E. corner of "reserve," washing away the rock MONUMENT at S. E. corner of "reserve." [Tr. p. 47.]

A civil engineer (H. H. Burton) testified to the *locus in quo*, submitting map of his survey, with distances, etc., used hereunder in argument. [Tr. p. 47.]

Defendant, relying on plaintiff's LACK OF TITLE, put in no evidence, except an admission by plaintiff of existence of a public highway, reserved by condition I of Mexican grant [Tr. p. 33], to connect with the landing place at the Port of San Pedro. [Tr. p. 48.]

Other Pleadings.

In addition to his denial of plaintiff's title, defendant's answer set up, by way of cross complaint, the facts herein above recited, showing the decree gave the title to the ERKEL STRIP to Sepulvedas and DENIED TITLE IN THE UNITED STATES [Tr. pp. 12-18]; and asked to have

a decree requiring the United States, as plaintiff, to correct its survey and patent to CONFORM to the decree of confirmation by showing the sea shore meander line in front of the "reserve," as the EXTERIOR BOUNDARY of Palos Verdes Rancho.

The facts set out in that cross complaint HAVE NOT BEEN DENIED nor has the pleading been demurred out. Thus, under the California practice, they are ADMITTED as true. Failure, too, to demur to the pleading WAIVES any possible objection that it is not proper practice in the United States courts. Being admitted as true, they (whether defendant is or is not entitled to a decree REFORMING the patent) establish the FACT that the United States DOES NOT own the ERKEL STRIP, and defendant, being in possession, is the presumptive owner.

The Missouri state practice in United States courts of setting up an EQUITABLE DEFENSE was sustained by U. S. Circuit Judge Thayer in 42 Fed., p. 207, Torrey v. The United States, in an action against the United States, under the Tucker Act. Possibly the doctrine may not go to the extent of AFFIRMATIVE relief, as encroaching on the equity jurisdiction. But, as a RULE of EVIDENCE in a law action, there seems no reason why Judge Thayer's decision is not sound; nor why any equitable right can not be proved on a cross complaint in DEFENSE of possession; and as showing a decree establishing the fact that the United States HAS NOT the title to the ERKEL STRIP. Its title or claim of title is BASED on a mere presumption of fact from the OMISSION of that strip (if it is omitted by the survey) from the patent, by the mistake of the surveyor. That presump-

tion cannot rebut a decree to the contrary; especially when its own evidence shows that decree. The real title is CONVEYED by the Mexican grant, as confirmed—the U. S. patent does NOT CONVEY any title; it is merely EVIDENCE of title, conclusive evidence on a collateral attack, it is true. (See Beard v. Federy, 3 Wall. 475.) But this is a direct attack by a cross complaint in A SUIT BROUGHT BY GRANTOR of the U. S. patent. The claim of title by the United States is based on a presumption arising from its OMISSION from the patent. The decree, however, and the FACT ADMITTED in the cross complaint, REBUTS that presumption.

Defendant, ERKEL, has, however, thus far relied on the proposition that, on the FACTS put in evidence by plaintiff (the United States), the TRUE CONSTRUCTION of the patent makes the SEASHORE (the "visible monument") called for by the decree, the EXTERIOR boundary line of the rancho, prevailing over the AMBIGUOUS survey. That FACT, however, admitted by the pleadings, goes one step further: DIRECTLY disproving title in the United States to the ERKEL STRIP. The claim of title by the United States, anyhow, is merely TECHNICAL—a mere presumption from not being in the patent (if that is true) and based on the mistake of the surveyor that is CORRECTIBLE on a mandamus against the Secretary of the Interior to compel him to do his "ministerial duty."

Marbury v. Madison, 1 Cranch. 39, annotated in U. S. S. Reports, Vol. 5-8, 2 Law. Ed.

It would seem pretty clear, then, that the United States cannot claim ANY TITLE to the ERKEL STRIP in

face of the DECREE, put in evidence by it, saying IT DOES NOT OWN IT, but that it is PRIVATE land of grantees. It will not be necessary, however, we think, to take any position on this point which is in the RECORD, though, and may be considered by this court, if it reaches it.

Points and Authorities.

The War and Engineer departments assumed that the U. S. patent survey ALONE governed in deciding upon the rancho boundaries—ignoring the Mexican grant, disena and Act of Juridical Possession; which are ALSO incorporated in the U. S. patent and to be considered in CONSTRUING its meaning—arriving at the INTENTION of grantor.

On that theory or basis, they decided that the south, west and north boundaries of the "Government Reserve" were, by that survey, INTENDED to be also the exterior boundaries of the rancho at that point. Thereby EXCLUDING from the physical limits of the rancho BOTH the "reserve" and the ERKEL STRIP in front, whereby that STRIP would become PUBLIC LAND, although clearly not within the limits of the "reserve," excluded or "reserved" from the GRANT to Sepulvedas of the Palos Verdes Rancho. Whereupon, in 1888 (and six years after Erkel went into possession of the FRONT three acres) [Tr. p. 15] they, through executive proclamation, included BOTH tracts in the "San Pedro Military Reservation."

An Exploded Theory.

Yet, in truth, that survey (even construed without the disena) DOES NOT exclude either tract from the rancho exterior boundaries. The INITIAL language of the survey shows a different purpose or INTENTION. The words, "BEGINNING at * * * and running thence ALONG THE HIGH WATER MARK ON THE SEA BEACH:", owing to the use of the colon (:), apply EQUALLY to Station 1 and to Stations 186-7-8-9. No INTENTION to leave the ocean meander, as the rancho boundary, is STATED until it reaches Station 238 [Tr. p. 42], where it SAYS it leaves the beach to go inland. The field notes are WHOLLY silent as to whether the south, west and north boundary lines of the "Reserve" are INTENDED to be ALSO the EAST boundary line of the rancho. The survey DOES SAY they are the "Reserve" boundaries: it DOES NOT SAY they are the rancho boundaries; or that the meander line is NOT the rancho boundary on the EAST in front of that "Reserve."

But the decree, itself, to which the law says the survey must conform and which is set out in the same patent, settles the DOUBT, arising from this ambiguous language of the survey. By the words, "leaving a RESERVE of 500 varas," it necessarily implies, *ex vi termini,* that the "Reserve" is INSIDE the rancho and is to be EXCEPTED OUT of the GRANT to Sepulvedas. If it were not INSIDE the rancho NO NEED existed for "leaving" it outside the GRANT. Besides the "Reserve" is made as a CONDITION of the grant—condition 4. [Tr. p. 34.]

The U. S. Supreme Court decisions hold that, on a

collateral proceeding, the survey prevails over a decree that is NOT SET OUT in the patent. They have never held it prevails over a decree that IS SET OUT in the patent; and NO court of the United States or of California has ever held that the DECREE (set out in the patent) will not control where the meaning of the survey is ambiguous and contrary to right.

Plainly, as we think, the survey itself, properly construed, means to declare the actual meander line of the ocean is the boundary of the rancho up to Station 238, and IN FRONT of the "Reserve," and the "substitute meander" line there was omitted by a mistake, and is, hence, to be supplied from the terms of the decree and of the INITIAL language by INTENDMENT OF LAW. (See Rawson v. Serrano, 47 Cal. 56.)

True Rule of Construction.

Construed by the survey ALONE, the INTENTION may be in doubt. But that is not the TRUE RULE for construing U. S. patents confirmatory of Mexican grants. The decree, Mexican grant with disena, and the Act of Juridical Possession, when ALL SET OUT IN that patent, are to be construed TOGETHER, along with the survey, in ascertaining the INTENTION of the United States, the grantor. If not so set out, of course the survey will prevail; until on a direct proceeding by mandamus to the secretary of the interior any error is corrected.

The disena in this case shows the rancho boundary at that point to be the sea beach. [Tr. p. 35.] It is SETTLED LAW in California that this "VISIBLE MONUMENT,"

found on the ground, prevails over the survey, in construing the extent of the grant, especially if the survey, as in this case, is UNCERTAIN and indefinite in its meaning. The LEADING cases on the construction of U. S. patents confirmatory of Mexican grants and settling that doctrine in California are:

MORE v. MASSINI, 37 Cal. 437, and
RAWSON v. SERRANO, 47 Cal. 55.

MORE v. MASSINI. In this case, the patent recites the decree, which described the land as "bounded on the south by the SEA SHORE." The survey line ran below high tide. The court held it was corrected by the decree's call for the sea shore as a "visible monument." "To ascertain the land granted, the several portions of the patent must be read and construed together. * * * The land confirmed is bounded on the south by the sea shore and the land included within the * * * survey will * * * be held * * * bounded on the south by the sea shore, unless the CALLS imperatively demand other boundaries."

RAWSON v. SERRANO. Ejectment. The patent included the decree and (by reference) the Mexican grant and disena and Act of Juridical Possession "for further description," as in this case, besides the U. S. survey. Owing to a confusion in the survey and plats, the line was in doubt. The disena called for a PUBLIC ROAD as a boundary. It was FOUND ON THE GROUND. The court held the road a "visible monument" that controlled the description, although there was a missing line, to be supplied. "A line in a survey which has evidently been

omitted will be SUPPLIED by INTENDMENT, rather than that the obvious intent of grantor should be frustrated." (P. 56.)

They are RULES OF PROPERTY in this state and are BINDING PRECEDENTS on the federal courts.

See Sec. 721 U. S. Revised Statutes.

159 U. S. 93, Grand Rapids Ind. R'way Co. v. Burton:

"Interpretation of U. S. grant must be decided by the LOCAL law of the state wherein such grant is located."

This proposition of law was conceded by the U. S. district attorney and the U. S. judge at the trial below.

A true construction, then, of the U. S. patent puts BOTH the "Reserve" and the ERKEL STRIP inside the Palos Verdes Rancho. Hence, these cases EXPLODE the theory of the war department. The ERKEL STRIP, therefore, is PRIVATE land, belonging to grantees of rancho and their assignes, UNLESS that STRIP is part of the "Government Reserve" on some other theory.

This makes a BRAND NEW question (viz.: whether it is part of the "Reserve") never yet passed upon by the war department or department of justice, nor by the courts here, except in a hasty NISI PRIUS decision ON A POINT that was NEVER ARGUED in the court below.

Location of the "Reserve."

The ERKEL STRIP, then, being inside the rancho, the question is whether it is private property or a part of the "Government Reserve" that was excepted out of the grant of the Palos Verdes Rancho.

To hold it a part of that "Reserve" would, it seems to

us, violate the plainest canons of the law—its most fundamental principles of construction, settled from the foundations of the common law. The "Reserve" was, plainly, CREATED by the Mexican grant June 3, 1846. It is not shown on the plan set forth in the petition of grantees [Tr. p. 35] and adopted by the grant. [Tr. p. 33.] It is excepted out of the grant of Palos Verdes Rancho by condition 4 of that grant. [Tr. p. 34.] The Act of Juridical Possession, by its survey, locates the "Reserve" [Tr. p. 34; "remeasure"] but leaves no specific written details of its survey to show EXACTLY where, on the "EASTERLY COURSE," it is located. That survey by the alcalde placed the four "corner" rock MONUMENTS where FOUND by the U. S. surveyor ON THE GROUND. There is nothing else in the record to show the location of that "Reserve" except these "corner" rock monuments, identified by the U. S. deputy surveyor in his field notes and set out in the U. S. patent: Being located on top of the bluff, 140 feet distant from high tide line at N. E. corner and 32 feet distant from S. E. corner [Tr. pp. 47-8], the intervening tract of nearly three acres, under the bluff, being the ERKEL STRIP in controversy.

The identification of these "corner" rock MONUMENTS by the U. S. surveyor is the highest, as well as the ONLY, evidence of the exact location of that "Reserve." The language is plain and clear. It says:

"Station 186; north 35 degrees east, 1.64 chains to a rock MONUMENT at the southeast CORNER of the Government Reserve, 500 varas SQUARE, excluded by the grant and JURIDICAL POSSESSION."

Stations 187-8-9 are the three other "corner" rock MONUMENTS, identified by this ONLY witness, with courses and distances, as the "Reserve" located by the Act of Juridical Possession and excepted out of the Palos Verdes grant. Nothing could be more explicit; and it is ALL set out in the U. S. patent. This, too, is absolutely ALL there is to the case, except that, inferably, these "corner" rock MONUMENTS were located by special agreement, AT THE TIME, by the owners and the alcalde, acting, as he was IN LAW, as the agent of the Mexican government. (See 5 Wall. 526, U. S. v. Pico; 4 Wall. 261, Graham v. U. S.; 129 U. S. 346, Pinkerton v. Ledoux.) This appears from the fact that the north and south lines FRONTING TOWARDS THE OCEAN, and of greater value than the rear towards the hills, is 1386 feet wide, or 11 feet longer than the 500 varas; while the east and west lines, running back towards the hills and of LESS VALUE are 1334 feet long, only. [Tr. p. 40.] These official distances approved by the land office are final. They cannot be disputed at all: especially by plaintiff, who put them in evidence; nor controverted by any difference in distances set up, incidentally, by plaintiff's witness whose testimony was admissible SOLELY to describe the PREMISES in CONTROVERSY; and not to attack the approved survey put in evidence by plaintiff.

Not "Liner" Monuments.

This ONLY witness does not say a word to indicate that those front rock MONUMENTS were not meant to be "corners;" or were merely located ON THE LINE to high water mark, with a serpentine, meander line, boundary on the east of the "Reserve."

On the contrary, he calls them "corner" monuments, and calls the "Reserve" one of "500 varas SQUARE"—excluding in the strongest possible language any but a STRAIGHT line on the east front. The law, too, INTENDS a STRAIGHT line to connect "corner" monuments, unless the context FORBIDS. So, too, the call for "corner" monuments implies a rectangular front line and excludes all idea that they were MERE LINERS to a corner at the serpentine meander, ranging from 32 to 140 feet distant.

These "corner" monuments are (1) recited in the field notes, (2) the field notes are set out in the U. S. patent, and (3) the monuments are FOUND ON THE GROUND. It makes the most IMPREGNABLE case to be found in the books in favor of MONUMENTS, as settling the land described in the deed—the location of the "Reserve," in this case.

The California Code, C. P., Sec. 2077, embodies the settled doctrines (codified) of the common law, on the subject of the controlling character of monuments and the superiority of "definite" and "ascertained" particulars over those that are "indefinite."

Not a "Water Boundary."

Judge Wellborn based his decision for the United States on the VAGUE language in the Act of Juridical Possession, as interpreted by the decree, to wit: "Thence running on an easterly course, leaving a 'Reserve' of 500 varas on each of the cardinal points." His idea seemed to be that the alcalde's survey being along the meander line, these words carried the implication that the "Reserve" was meant to front on the meander line as well as to be on an "easterly COURSE."

But that rule seems to us to violate the settled rule of construction, giving priority to "certain, definite and ascertained" particulars in the description over "indefinite" language; especially when, as in this instance, the words, "easterly COURSE," are satisfied, according to common understanding, by the location between the four corners, which are certainly on an easterly course from EL CODO. It also violates the rule as to "permanent and visible" and "ascertained" monuments—all of which are found in this description.

Nor does the RECORD disclose any reason why the Mexican "Government Reserve" should have a water front boundary, so as to justify any such STRAINED construction. The grant, itself, shows ONLY the purpose to make of it a cattle common, since it only provides for PASTURAGE AND WATER. [Tr. pp. 33-34.] The cattle trade being then the only commerce as shown in Richard Henry Dana's classic story [Tr. p. 48], "TWO YEARS BEFORE THE MAST." The public high-

way, reserved by condition I, secures the needed access for that purpose.

The grant to TEMPLE and another [Tr. p. 43] was put in to support the idea of NECESSITY for a "water boundary." But that disproves the claim: since it was 100 varas SQUARE, WITHOUT any water boundary. Like the later "Reserve," it is expressly a "square." The claim on that score is very DIAPHANOUS: it cannot justify overruling the "TESTIMONY OF THE ROCKS." Americans would have provided for a "water front," no doubt; but Mexicans did not regard it important. Nor can a court supply the omission by violating settled canons of construction.

The district attorney claimed that the same LEGAL FICTION applicable to a "substitute meander line" on a bluff should be applied to these "corner" monuments. But the fact that the U. S. surveyor adopted two of them as substitute meander posts for his RANCHO survey does not change the character given them by Alcalde Cota, as "corner" monuments of the "RESERVE." If those "corner" monuments had been set by the U. S. surveyor as substitute meander posts, instead of by Alcalde Cota as "corner" monuments of the "Reserve," Mr. Lawler's claim might have had some force. He claimed, also, that the "corner" monuments were set on the bluff as a matter of SAFETY, and were merely on the LINE TO THE CORNER at the water line; which he assumed (without any FACT to support it) OUGHT to be the boundary. But the ONLY witness flatly refutes such a theory by calling them "corners" at the specific places where located, by careful courses and distances: a par-

ticularity seldom found in conveyances of land. If such a purpose had existed in the alcalde's mind and Hancock found it out, he could have stated it and would then have located the monument at Station 186 as being "on a line to the corner at HIGH WATER MARK," instead of calling it the "corner" ITSELF.

Come let us reason together. Uncle Sam is no AHAB, coveting NABOTH'S VINEYARD. He would scorn to take as his the land which his own courts have decreed he DOES NOT OWN. Especially when a writ of mandamus to the Secretary of the Interior would compel him, as a "ministerial duty," to correct the technical mistake of the surveyor and to issue a patent complying with the decree that settles that Supelvedas and their assigns own that ERKEL STRIP.

Wherefore plaintiff in error respectfully submits those propositions of law and asks a final decree by this court adjudging that defendant in error is not the owner, nor entitled to possession of the premises in controversy.

SIDNEY DELL,
Attorney for Plaintiff in Error.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

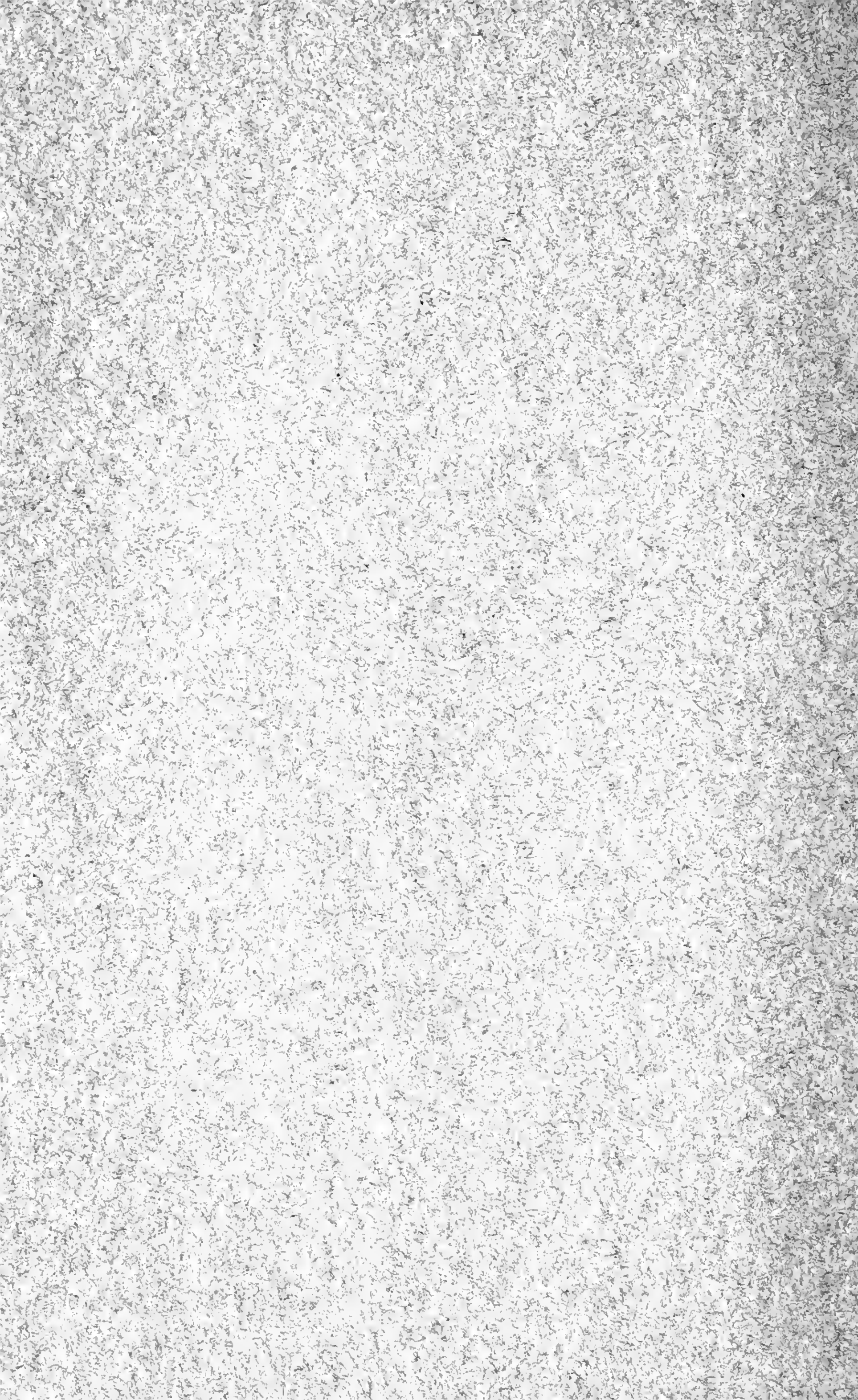
No. 1666.

George Erkel,
Plaintiff in Error,
vs.
The United States of America,
Defendant in Error.

Reply Brief for Defendant in Error.

OSCAR LAWLER,
United States Attorney.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.



United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 1666.

George Erkel,
Plaintiff in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF.

The case comes here upon writ of error from a judgment in favor of the government after trial without the intervention of a jury, there having been no written stipulation waiving a jury.

Under such circumstances the first assignment of error (insufficiency of evidence to justify the finding) cannot be considered, nor can any of the questions decided at the trial be re-examined.

Revised Statutes, Secs. 649 and 700;
County of Madison v. Warren, 106 U. S. 622;
Campbell v. Boyreau, 21 How. 223;

Bond v. Dustin, 112 U. S. 604;
Van Stone v. Manufacturing Co., 142 U. S. 128;
Hill v. Woodberry, 49 Federal 138.

Briefly the facts are that by a Mexican grant of date June 3, 1846 [Tr. p. 33] Jose Loreto Sepulveda and Juan Sepulveda became owners of the Rancho Palos Verdes, the grant containing the reservation that "They (the grantees) shall leave free on the tract of San Pedro 500 varas in each direction of the four cardinal points," "for the uses of the superior government."

In 1880 [Tr. p. 36], after and pursuant to due proceedings had before the land commission and the federal courts for the confirmation of said grant under the act of March 3, 1851 [Tr. p. 36], patent to said rancho, containing the same reservation, was issued to said grantees. Said patent was accompanied by field notes and map of survey made by Surveyor General Hancock, in which said reservation, fronting on the Bay of San Pedro, is indicated by stations (monuments) numbered 186, 187, 188 and 189. [Tr. pp. 39-43.] In front and for some distance on either side of said reserve there extends along the ocean shore line a high bluff, and the courses and distances of the survey are run from monuments along the top thereof—in other words on what is commonly called a "substitute" meander line. The monument at station number 186, at the southeast corner of the reservation, has disappeared, having been undermined by the action of the waters. [Tr. pp. 50 and 51.]

Maps introduced [p. 48] show that under the act of the legislature of California of 1897, the government ac-

quired, by virtue of its ownership of the reservation, 38 acres of so-called tide flats immediately in front thereof, of uniform width therewith.

Erkel occupies a narrow strip of land lying between the bottom of said bluff and the water line. As nearly as the government has been able to make out the contention of his counsel, it is that the government reserve does not extend beyond a straight line drawn between stations 186 and 189—in other words, that it does not extend to the water line.

The decrees of the commission and courts confirmatory of the grant, together with the map and patent, were conclusive as between the government and the Sepulvedas.

Act of Mar. 3, 1851, 9 Statutes 631.

The monuments on the top of the bluff will be treated as being the water line, the line upon which they were placed being, because of physical conditions, merely a substitute.

Howard v. Ingersoll, 13 Howard 422;
5 Cyc. 904;
Brown Ore Co. v. Caldwell (W. Va.), 29 Am. St. Rep. 793;
Lowe v. Tibbets (Me.), 39 Am. ~~St.~~ Rep. 304.

Certain matter is set up in the answer which is designated as a "separate answer," "counter-claim" and "cross complaint."

Said matter did not constitute a counter-claim, and this being an action at law, a cross complaint is unavail-

able. If it amounted to anything, it was simply the assertion of evidenciary matter showing the details upon which the government's ownership and right to possession were denied, and it appears therefrom that the lands in question were included within the boundaries of the government reservation. [Tr. p. 13.]

The only question in the case was whether in a survey of property adjoining the ocean, monuments placed upon a bluff immediately above the water should be construed as being on the tide line, and the court answered that they should.

"Grants of land bounded by the sea * * * extend to high water mark. * * *

"Where land adjoining a fresh water river or above tide water is described as bounded by a monument * * * standing on the bank, and a course is given as running from it * * * to another monument standing upon the bank, these words necessarily imply as a general rule that the line is to follow the river * * * and the grantee takes to the middle of the river."

Howard v. Ingersoll, 13 How. 422.

It is submitted that no error was committed and judgment should be affirmed.

Respectfully submitted,

OSCAR LAWLER,

United States Attorney.

No. 1666.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AFFIRMANCE: MAY SESSION, 1909.

George Erkel,
Plaintiff in Error,
vs.
The United States,
Defendant in Error.

PETITION FOR REHEARING.

To the Hon. Circuit Judges of Said Court:

Plaintiff in error herein respectfully asks for a rehearing of said cause upon the grounds hereunder set forth.

FIRST. Petitioner was taken by SURPRISE by this REVERSAL of the decision, *ore tenus,* made in his favor at the trial on the technical point as to a "written stipulation." His attorney was stopped in the midst of the argument and the point of defendant in error overruled,

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even before counsel had fully argued it as intended and as ENTITLED TO DO BEFORE A DECISION AGAINST HIM.

SECOND. The court, to sustain its decision, quotes from Campbell v. Boyreau, 21 How. 223, to-wit:

"It is well settled that no question of law can be reviewed on error, except those arising upon the processes, pleading or judgment, unless the facts are found by a jury by a general or special verdict, or are admitted upon a case stated."

And further: "That decision [Campbell v. Boyreau] was had prior to the enactment of the statute which is carried into the Revised Statutes as sections 649 and 700. * * * Under that statute it has been uniformly held that if a case is tried before the court without a jury, and there is no written stipulation waiving a jury, none of the questions decided at the trial can be re-examined in an Appellate Court on writs of error. * * * The contention of the plaintiff in error relative to the provisions of the Civil Practice Code of California, involves a misconception of the decision in that case."

To all of which, we respectfully answer, as herein set out.

At an early date in our judicial history (1816) the U. S. Supreme Court held, on established doctrines of the common law, that a trial by the court of an action without a jury was not "a judicial act," but a mere arbitration, and, hence, not reviewable. On May 26, 1824 (4 Stat. 62), an act of congress adopted for the federal courts of Louisiana (wherein alone of all the states the

Civil Law obtained) the state practice of that state, as follows:

"The mode of proceeding in civil causes in the courts of the United States * * * established in the state of Louisiana shall be conformable to the laws directing the mode of practice in the district courts of the said state."

The case of Campbell v. Boyreau, from California (1858-9), was tried by the court on waiver of a jury. The Supreme Court reiterated the doctrine that it was not a "judicial act" and, hence, not reveiwable on writ of error, not being the action of the court which was authorized by the Judiciary Act of 1789 (Sec. 691, U. S. R. S.) to be reviewed, to-wit:

"All final judgments of any circuit court * * * may be re-examined and reversed or affirmed in the Supreme Court on writ of error."

The practice of a quarter century in cases from Louisiana was urged by the losing side as a precedent. But the court, Taney, C. J., said:

"The cases referred to in argument which were brought up by writ of error to the Circuit Court of Louisiana, do not apply to this case. The act of congress of March 26, 1824 (4 Stat. 62), ADOPTED THE PRACTICE OF THE STATE COURT in the courts of the United States and a writ of error to a circuit court of that state, THEREFORE, is governed by different principles from a like writ to the circuit court of any other state. And as, by the laws of Louisiana, the facts by consent of parties may be tried and found by the court

without the intervention of a jury, this court is BOUND, upon a writ of error, to regard them as JUDICIALLY DETERMINED and to treat them as if THEY HAD BEEN FOUND by a SPECIAL VERDICT, and the questions of law which arise upon them are CONSEQUENTLY open to the revision of this court."

That decision HAS NEVER BEEN OVERRULED: it is sound and IRREVERSIBLE—ancient and rock-ribbed as the hills.

Under that decision, the finding of fact by the court in the CASE AT BAR was a "judicial act," and reviewable as "the final judgment of the Circuit Court," on writ of error under Sec. 691, U. S. R. S., because the act of congress of June 1, 1872 (Sec. 914, U. S. R. S.), adopted the law of California (1851, C. C. P. Sec. 631) making an oral waiver in open court a "judicial act." and HENCE reviewable here under Sec. 691, U. S. R. S. Nor has a SINGLE CASE ever been decided by the U. S. Supreme Court to the contrary: nor will it ever be so long as the LATER State Practice Act is in force. No one can doubt that (1) the oral waiver statute of California was adopted by said Sec. 914; nor (2) that a trial on such a waiver is a "judicial act"; nor (3) that it is reviewable under the terms of section 691, U. S. R. S. as settled by the practice and decisions of the U. S. Supreme Court—unless sections 649, 700, Revised Statutes, requiring a "written stipulation" are exclusive: for which proposition there is not a SINGLE decision of the U. S. Supreme Court. The chronological history of that act of 1865 will show clearly no such purpose existed, and a review of the cases will show NO SUCH DECISION has ever been made.

The loss of the great case of Campbell v. Boyreau on such a technicality, contrary to the Practice Act (1851) of California caused a shock that created a deep interest in preventing such mishaps. The din of war, however, delayed congressional action until March 3, '65, when section 649 was adopted providing, by direct act of congress, for a trial of fact by the court in actions at law on a waiver in writing: which provision BY ITSELF made the trial a "judicial act" and, of course, reviewable under Sec. 691 as above set out, under the same rules as govern verdicts, general or special. Section 700, applicable to "any civil cause," either at common law or equity, was added. It reads:

"When an issue of fact in any CIVIL CAUSE in a circuit court is tried and determined by the court without the intervention of a jury, according to section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts to support the judgment."

This act (1) reiterated the existing right of review in actions under Sec. 691; (2) reiterated the existing requirement of a bill of exceptions in common law actions and the existing rule as to a special finding, in the nature of a special verdict, and (3) extended the writ of error (doubtless to cover the Louisiana case) to equity cases upon a bill of exceptions. The last was the ONLY new feature added to the existing law by section 700.

Seven years later, the bar, realizing the importance of protecting suitors against pitfalls, and of POPULARIZING the Federal courts with the profession by having the same practice in both courts in civil actions, caused the passage of an act of congress (June 1, 1872), adopting the State practice, to-wit: "The practice, pleadings and forms and modes of proceeding in civil causes [actions], existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held." An act far more comprehensive than that of 1824 and under which no one can fairly deny that the oral waiver law of California was made a LAW OF CONGRESS. As a later act of Congress than that of 1865, its effect was, not to repeal that act but to MODIFY Sec. 700 so as to read as follows:

"When an issue of fact in any civil cause * * * tried * * * by the court without the intervention of a jury, according to section 649 [or on an oral waiver in an action in any state authorizing the same], the rulings of the court * * * may be reviewed by the Supreme Court upon a writ of error or upon appeal and when the finding is special the review may extend to the determination of the sufficiency of the facts to support the judgment."

The two acts stand together. If no State statute exists the federal law operates to protect the public. The State practice, if any, applies in all cases and where no waiver of jury trial was provided for by it then suitors can have it under Sec. 700. The SPIRIT of the law was to assure such a trial to be "judicial," if allowed either by state or federal practice, and reviewable, to prevent

gross injustice. Incidentally, it, of course, modifies the Louisiana act of 1824 by requiring a bill of exceptions in the record according to the common law procedure, instead of the vague practice of the Civil law.

A brief review of the decisions, since the act of 1865, will show that nothing to the contrary has been decided by the U. S. Supreme Court.

Insurance Co. v. Tweed, 74 U. S. 67 (L. Ed. Vol. 19, p. 65) from E. District of La. (1868-9) was the FIRST case arising under act of 1865. There was no bill of exceptions. Evidence was found in the transcript; but nothing to show whether it was ALL the evidence or how it came there. The court declined to consider it, saying that while it had been the practice to accept the "statements of facts * * * in the opinion of the court * * * as part of the record, where they were in themselves sufficient * * *, IN REGARD TO THE LATTER we are not now at liberty to do so 'under' the act of March 3, 1865," meaning, of course, that there must be a bill of exceptions according to that act.

They add: "We are asked * * * to accept the * * * opinion of * * * the court * * * as a sufficient finding of the facts within the statute and within the GENERAL RULE on this subject." But this was declined BECAUSE IT WAS IMPERFECT. An obiter was added calling attention to the absence of a written stipulation as a further excuse for refusing; but that question could not arise until a PERFECT finding of facts was offered. Thereupon, the case was argued on an agreed statement of facts.

This case may be conceded as settling that the pro-

visions of Sec. 700 apply in all States in all cases as to bills of exceptions and special findings, as a pre-requisite to a review of errors on trials of issues of fact by the court. But it does not OVERRULE 21 How. 223, as to an oral waiver making the trial by the court a "judicial act" and reviewable in all cases (when a bill of exceptions exists) where a State statute to that effect has been adopted by act of Congress of June 1, 1872. Such an effect could not be given to any OBITER such as that: overturning by an ill considered word, the settled doctrines of ages. Such a revolution must be held to have been made only where the question was squarely before the court and plainly decided. The oral waiver made the trial (under the act of 1824) as much of a "judicial act" and reviewable in 1868 as it was in 1858, and if there had been a perfect bill of exceptions in the record it would have been so decided on the point being plainly made.

The SECOND case that arose under that act of 1865 was Flanders v. Tweed, 76 U. S. 679, 9 Wall. 425 (1870-1), error to Eastern District Louisiana Circuit Court. In lieu of a bill of exceptions, the usual statement of facts in the opinion of the court was absent. There was nothing but "a statement of facts by the judge * * * filed * * * nearly three months after rendition of the judgment." The court held it was not part of the record and declined to review the case upon it; but, instead of affirming the court below, the Supreme Court, owing to the "very special circumstances" under which "the parties below supposed that they had made up a case according to the practice in Louisiana" decided

to "reverse the judgment for a mistrial and remand it for a new trial." It is true, Mr. Justice Nelson speaks of the stipulation in writing as the condition upon which "the parties are authorized * * * to waive a jury and save to themselves * * the rights and privileges * * in trials by jury at common law." But NO QUESTION AROSE in that case as to whether the ORAL WAIVER was a "judicial act" and reviewable, as decided in 24 How. 223, nor whether the practice in the U. S. Supreme Court for 40 years, or its decision in Campbell v. Boyreau, endorsing the same, had been all wrong. The SOLE question was on the absence from the record of any SUBSTANTIAL BILL OF EXCEPTIONS. A careful reading of Justice Nelson's opinion discloses that his OBITER DICTA were intended to rid the Supreme Court of the "painful" maze of the civil law system of exceptions for review.

That single point was all that was before the court in that case, yet it is the single case cited in all subsequent cases as settling the claim (always obiter) that a "written stipulation" alone justifies review of the Circuit Court action on issues of fact in case of waiver of jury trial. There are several such cases; but in not A SINGLE ONE was a state statute, authorizing an oral waiver, INVOKED or passed upon. Take the case of Kearney v. Case 12 Wall. 275, for instance; and that of 16 Wall. 250, where there was a stipulation in writing and no state statute for oral waiver invoked or considered; also that of 10 Otto 409, where a jury trial for a garnishee was involved but no state statute involved on the point. So, too, as to the three cases cited in brief of defendant in error.

In very truth, the direct question herein made has never arisen under the act of June 1, 1872, nor has it ever been decided by the U. S. Supreme Court. It stands solely on the decision in 21 How. 226, sustaining our view, and on the plain statutes and settled principles of law herein cited. The IDEA that nothing but a "written stipulation" will do, even where the state statute for an oral waiver adopted by the act of June 1, 1872, exists, has been filtered into some minds; but it is unsound in principle and unsupported by authority.

THIRD. Besides that, all the FACTS, set out in our bill of exceptions, are alleged in defendant's cross bill and stand UNDENIED, and hence ADMITTED to be true, as they really are. We invite the court's attention, in this behalf, to page 9 of brief of plaintiff in error, with pencil memoranda as to the effect of that pleading as A RULE OF EVIDENCE, especially where no demurrer nor motion to strike out has been filed against it. That cross bill, as State practice is properly pleaded in an action in Federal Court, not by way of affirmative relief, but purely (as Cir. J. Thayer held in 42 Fed. 207) by way of defense and in NEGATION of the right asserted by plaintiff. If this is correct, the first question is avoided.

FOURTH. All else failing, we respectfully insist that this is a case "of very special circumstances," wherein the court should reverse the judgment below, as a MISTRIAL and order a new trial, as was done in Flanders v. Tweed, *supra*.

The brief of the attorney for the United States practically concedes every position on the merits in our brief,

and makes farcical the contention that the United States has any title to the 3-acre tract. Every case cited therein (in support of his ONLY legal proposition, one UNKNOWN to the law) strongly endorses ERKEL'S contention as to the controlling effect of the "corner" monuments found on the ground and recited with infinite precision as to LOCATION and PURPOSE in the United States patent. The farcical nature of his claim of title, too, was betrayed by the setting up of Mr. Justice Nelson's opinion (garbled, besides,) as that of the court to sustain an unheard of doctrine of law.

The only REAL argument on the merits was that, OBTRUDED on the court and which we were compelled to notice in open court, of the incidental loss by the United States of a half million dollars' worth of tide flats if ERKEL won. A purchase though by the United States from the OWNER would prevent that loss. But the richest, most powerful and most MAGNANIMOUS nation on earth would scorn to re-enact the drama of Naboth's vineyard; and would repudiate any agency that sought to take ERKEL'S land unjustly. Besides, that OBTRUSION reflects on this court: which reflection I beg here to repudiate. Two GREAT FACTS, assuring the independence of the Federal courts of this nation, have elevated them to the HIGHEST PLANE. These are (1) the fact of their life tenure, and (2) the fact that this most MAGNANIMOUS sovereign of history, past or present, would scorn (especially under recent administrations) to have subservient courts that would make him such a gift. Unlike many local sovereigns, or bosses, Uncle Sam would vastly prefer HIS courts to resolve its doubts,

in cases of right, in favor of the humble suitor and against himself. If he needs ERKEL's land, he is willing to buy it: he would scorn to rob him of it, under the guise of law, especially technical law. No: subserviency is a MINUS quantity in the American Federal judiciary.

Petitioner would therefore appeal to this court to return to its first decision, made in open court, and reverse its later opinion made without hearing our side.

SIDNEY DELL,
Attorney for Plaintiff in Error.

I, SIDNEY DELL, counsel for George Erkel, plaintiff in error, do hereby certify that, in my judgment, the foregoing petition for rehearing is well founded and that it is not interposed for delay.

SIDNEY DELL,
Counsel for Plaintiff in Error.

No. 1667

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

CONRAD FREEDING, PHIL ERNST, THORULF LEHMAN, A. C. CRAIG AND CHARLES F. RICE, Constituting the Common Council of the Town of Nome, District of Alaska,

Plaintiffs in Error,

vs.

A. A. ALLEN, JOHN H. DUNN AND JOHN T. REED, Constituting the School Board of the Nome School District,

Defendants in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the District of Alaska, Second Division.

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[Names and Addresses of Attorneys of Record.]

C. S. HANNUM, Nome, Alaska,

JNO. T. REED, Nome, Alaska,

JNO. J. REAGAN, Nome, Alaska,

Attorneys for Petitioners.

JOHN RUSTGARD, Nome, Alaska,

Attorney for Respondent.

In the District Court for the District of Alaska, Second Division.

In the Matter of the Petition of A. A. ALLAN, JOHN H. DUNN and JOHN T. REED, Constituting the School Board of the Nome School District, Alaska, for an Apportionment of the Federal License Moneys Collected by this Court, the Apportionment to be Paid to the School Board to be Expended by It for School Purposes, in Said School District.

Petition [for Apportionment of Certain Federal License Moneys, etc.].

To the Honorable ALFRED S. MOORE, Judge of the District Court for the District of Alaska, Second Division.

The petition of the undersigned, A. A. Allan, John H. Dunn and John T. Reed, respectfully represents to your Honor, as follows:

That your petitioners are the duly elected, qualified and acting members of the School Board of the Nome School District, Alaska, and are respectively the Director, Treasurer and Clerk thereof, and constitute all the members of said board, and that as

such School Board, they have the supervision and control of the Public School of Nome, Alaska, the direction of the expenditure of all moneys available for school purposes within said Nome School District, the power to hire and employ the necessary teachers, to provide for heating and lighting the schoolhouse, and that in general they have the power to do and perform everything necessary for the due maintenance of a proper school within said Nome School District.

That the school within the said Nome School District, under the supervision and control of your petitioners, will reopen on the eighth day of September next, when the ensuing school year will begin, and said school year, consisting of nine (9) months, will end during the latter part of May, 1909.

That after the close of the last school year in May, 1908, and upon the said petitioner, Reed, on or about the 14th day of July, 1908, qualifying as Clerk of said School Board, your petitioners did, on the 14th day of July, 1908, meet and organize as such School Board, and did, thereafter, on said last-mentioned day, thoroughly inspect the building in which was held and to be held, the school under the control and supervision of your petitioners, as such School Board, and did, after such inspection, thoroughly discuss the condition of said building, and did carefully consider the question of the security and sanitary condition thereof, and after such inspection and consideration, your petitioners, as such School Board, deemed it necessary, as well as their duty, to have said building put into a thoroughly safe and sanitary condition.

That thereupon, your petitioners, as such School Board, employed A. C. Craig to level the school building and do the necessary carpenter work in connection with the repairing thereof and the putting of said building in proper condition. That the said building was raised by the said Craig, fourteen (14) inches thereabouts, in order to bring it to a level and make it safe.

That the matter of ventilation has been attended to, fire escapes have been put up on the outside of building, a new floor has been laid in the gymnasium, new toilets put in, the building newly painted and papered, all broken glass replaced, the boiler repaired and securely supported, the boiler-room enlarged, the heating plant put in proper order, in short, the building is being put into a thoroughly safe and sanitary condition throughout.

That all repairs made and all work done were absolutely necessary in order to render the building safe and sanitary, and all expenditures incurred in connection therewith, were justified by conditions, and not one dollar of expense has been needlessly incurred.

That when the work of repairing the said school building was first undertaken, your petitioners requested the members of the Common Council of the City of Nome, Alaska, to inspect said building and satisfy themselves as to its unsafe and unsanitary condition, so that no question could afterwards arise in the minds of the members of said Council, as to the necessity of the work so undertaken by your petitioners, as such School Board.

That your petitioners are informed and believe, and upon such information allege, that Conrad Freeding, President of said Common Council, and Phil Ernst, Thorulf Lehman and A. C. Craig, members thereof, did inspect said building as requested, and became satisfied and did state that the work undertaken by your petitioners was justified and necessary.

That the work so undertaken by your petitioners, as such School Board, has been very extensive, but is being done as cheaply as is consistent with the safety and sanitary condition of said building, and as cheaply as first class work can be done for.

That the school building was constructed some seven or eight years ago, and was in a very dilapidated condition at the time the present work of repairing was begun by your petitioners.

That the work undertaken by your petitioners, as such School Board, will be completed in a few days, and payment therefor will be due immediately thereafter, and should be promptly made.

That your petitioners, as such School Board, have ordered a large amount of necessary school supplies, which supplies are due any day from Seattle, Washington, and payment thereof and freight thereon should be promptly made.

That your petitioners, as such School Board, have engaged teachers and a janitor, the same in number and at same salaries as prevailed last year.

That in order to secure funds to meet the necessary expenditures for the ensuing school year, incurred by reason of the facts above stated, your petitioners,

as such School Board, addressed to the Common Council of the City of Nome, Alaska, said Common Council being a municipal corporation, organized and existing under and by virtue of the laws of the District of Alaska, having charge of the affairs of the municipality of said city of Nome, and in its line of duty, being charged with the providing of funds for maintaining the school within the said Nome School District, two (2) communications, dated July 20, 1908, and August 25, 1908, true copies of which communications are hereto attached, marked Exhibits "A" and "B," and hereby made a part hereof, asking said Council to provide the necessary funds to maintain said school during the ensuing school year. That said communication clearly set forth the respective purposes for which the funds asked for of said Common Council were required, and for what purposes said funds would be expended.

That because of inability to secure a quorum so as to hold a meeting, the said Common Council did not take any action on said communications until Tuesday evening, August 25th, 1908, when, at a meeting of said Council, held that evening, the said two communications Exhibits "A" and "B" were read, and action thereon taken, as set forth in a communication from the municipal clerk of Nome, Alaska, a copy of which is hereto attached, marked Exhibit "C," and hereby made a part hereof, the original of which communication, Exhibit "C," is herewith submitted to your Honor for inspection, with a request on the part of your petitioners that the said original be returned to your petitioners, for their official files.

That as appears from said Exhibit "C," the Finance Committee of the said Council, and the said Council itself, did not question nor doubt the reasonableness, correctness and justice of said items, as set forth in said Exhibits "A" and "B," except in so far as regards the items of $250.00 for salary due Professor Grimm, and $358.48 for unpaid bills of former School Board, but said Finance Committee and said Council maintained that there should be deducted from the amount of $20,500.00 asked for by the School Board, the sum of $3,000.00, being an amount which the said Finance Committee and said Council claimed had been illegally expended by former School Boards out of moneys paid said former School Boards by the City Council of Nome, Alaska, and said Common Council accepted and adopted the report of said Finance Committee, as set forth in said Exhibit "C," with said qualifications as to the nonappropriation and nonpayment of the said $3,000.00, until such time as your petitioners, the said present School Board, should make an effort to recover the said $3,000.00, claimed by the said Finance Committee and Council, to have been illegally expended as aforesaid by said former School Boards, or until your petitioners, the said present School Board should show its inability to collect it, in which latter event, the said Council would then pay over to your petitioners, as such School Board, the said $3,000.00, so, for the time being, to be withheld by said Council.

That two of your petitioners, to wit, John H. Dunn and John T. Reed, attended the meeting of said Common Council, on Tuesday evening, August 25th last,

and with the permission of the Council, addressed the members thereof while in session as a Council, and urged them to accede to the request of your petitioners, as contained in Exhibits "A" and "B," but said Council refused to do so, and said Council ever since has refused and still refuses to accede to the request of your petitioners, as such School Board.

That at said last mentioned meeting, your petitioner, the said Reed, stated to said Council that no appropriation of money for salaries to any members of the present School Board, composed of your petitioners, was asked for, but that the amount of $12,825.00 asked for of the Council, as set forth in Exhibit "A," was solely for salaries for the ensuing school year, for teachers and janitor, and said petitioner, Reed, further stated to said Council that the item of $358.48, for unpaid bills of old School Board, did not include any item of salary for any member of the old School Board.

That your petitioners believe and allege that, the action of said Council in refusing to grant to your petitioners, as such School Board. the appropriation of said sum of $20,500.00, in full, as asked for in their communication, marked Exhibits "A" and "B," is wholly unwarranted and illegal, and in no manner whatever justifiable, and that the said Council and the members thereof, in their said refusal to make the appropriation asked for, are acting in a headstrong, unreasonable and arrogant manner, and acting unjustly, and by their said refusal are hampering the proper conduct of school matters in said

Nome, and endangering the due maintenance of said school by your petitioners.

That your petitioners, as the present School Board, have no control whatever over any expenditures made by the former School Boards in said Nome, nor any authority whatever to demand or enforce repayment from any former School Boards or members thereof, or from anyone, of any sum or sums of money whatever, paid out by any former School Boards, or members thereof.

That your petitioners believe that it would be useless, and also that it is not incumbent upon them, to again appeal to said Common Council, for the appropriation to your petitioners, as such School Board, of the said sum of $20,500.00, and so respectfully present this petition to your Honor and submit to your Honor that, unless your Honor will grant the prayer of this petition, your petitioners, as such School Board, will be without funds to meet the payment of bills necessary for repairs made as aforesaid, and to defray the expenses for the due maintenance of the schools in said Nome School District, during the ensuing school year, beginning and ending as above mentioned.

That the salaries to be paid the teachers are very reasonable, and in fact much below what the teachers are, in all fairness, entitled to, and were it not for the heavy, though necessary, expenditures incurred this year for the aforesaid repairs, your petitioners would have increased said salaries, believing that such increase would be for the welfare of the school.

That your petitioners believe that, since said Council, while not disputing the reasonableness, correctness or justice of said items set forth in said Exhibits "A" and "B," nevertheless refuse to appropriate for the use of said School Board, the full sum of $20,500.00, asked for by your petitioners, that it is the duty of your petitioners, as such School Board, in order that the due maintenance of the said school may not be hampered or endangered, to ask your Honor, as Judge of this Court, to apportion to your petitioners, as such School Board, such percentage of the Federal license moneys collected by this Court as your Honor shall deem fair, reasonable and just, in view of the facts above set forth, in order that your petitioners, as such School Board, may duly maintain said school in an efficient manner during the ensuing school year, and that such money, when apportioned to your petitioners, as such School Board, be paid to the Treasurer of the town of Nome, Alaska, and by said Treasurer be forthwith paid to your petitioners, as such School Board, to be expended by them, as such School Board, for school purposes, within the said Nome School District, during the ensuing year.

That your petitioners allege that, if the said license moneys are wholly paid over to the said Common Council, and the apportionment herein asked for be not made, that said moneys when paid to said Council will be by said Council dissipated, and your petitioners, as such School Board, will by reason of such dissipation be unable to secure from said Council

sufficient funds to maintain said school during the ensuing school year.

That from as accurate an estimate as your petitioners are able to make at this time, they believe that the average attendance of pupils in said public school during the ensuing school year will be about one hundred and ninety (190) in number.

That your petitioners respectfully submit, that in view of the facts set forth in this petition, that fifty (50) per centum of said federal license moneys collected by this Court is a fair, reasonable and just amount to be apportioned to your petitioners, as such School Board.

That your petitioners, as such School Board, have no plain, speedy and adequate remedy at law to obtain the relief herein asked for, and, therefore, present this petition.

Wherefore, by reason of the facts herein set forth, your petitioners, as such School Board, respectfully petition your Honor for an order apportioning the federal license moneys collected by this Court, so that your petitioners, as such School Board, may receive fifty (50) per centum, or such other percentage thereof, as your Honor may deem proper in the premises, until your petitioners receive the full amount of $20,500.00 asked for of said Common Council, in order that your petitioners may fulfill the contracts they have made as aforesaid, and pay the indebtedness already incurred, and to be incurred during the ensuing school year for the due maintenance of the school in the said Nome School District, and that the Treasurer of the town of Nome,

by said order, be directed to pay directly to your petitioners, as such School Board, to be used by said board for school purposes, as above set forth, fifty (50) per centum, or such other percentage as your Honor may deem proper in the premises, of all federal license moneys paid under the law to him, the said Treasurer of the said town of Nome, by this Court or the Clerk thereof, until said sum of $20,500.00 is fully paid to your petitioners, as such School Board, by said Treasurer of the said town of Nome, and that said fifty (50) per centum, or other percentage as may be determined by your Honor, be paid to the Treasurer of the said School Board, for the use of said School Board in the due maintenance of the public school in said Nome School District, by said Treasurer of the said town of Nome, as fast as he, the said Treasurer of the town of Nome, shall receive the said license moneys from this Court, or the Clerk thereof, and that a certified copy of the order granted and issued by your Honor, upon this petition, when served by said petitioner, John H. Dunn, the Treasurer of said School Board, or by anyone of your petitioners, upon the Treasurer of the said town of Nome, shall be authority for the said Treasurer of the said town of Nome, and it shall be his duty to forthwith pay to your petitioners, through the said John H. Dunn, Treasurer of said School Board, said fifty (50) per centum, or other percentage of said license moneys, as may be determined by your Honor, as fast as said license moneys are received by the said Treasurer of the town of Nome, from this Court, or the Clerk thereof, until the said

amount of $20,500.00 be paid your petitioners, to be expended by your petitioners, as such School Board, during the ensuing year, for the maintenance of the school in the said Nome School District, and for such other and further order and relief as to your Honor may seem just and proper in the premises.

That your petitioners allege that there are now in the hands of this Court or the Clerk thereof, from license moneys collected by this Court, to be paid over to the Treasurer of the said town of Nome, about ten thousand ($10,000.00) dollars, which amount will be increased from time to time as licenses are granted and issued by this Court.

Dated at Nome, Alaska, September 5, 1908.

ALEX ALLAN,
JNO. H. DUNN,
JOHN T. REED,

Constituting the School Board of the Nome School District, Alaska,

Petitioners.

JOHN T. REED,
Attorney for Petitioners.

United States of America,
District of Alaska,
Second Division,—ss.

A. A. Allan, John H. Dunn and John T. Reed, being each duly sworn, depose and say, that they are the petitioners named in the foregoing petition. That they have each read the foregoing petition, know the contents thereof, and that the said petition is true,

as they verily believe. That they are respectively, the Director, Treasurer and Clerk of said School Board mentioned in said petition.

ALEX. ALLAN.
JNO. H. DUNN.
JOHN T. REED.

Subscribed and sworn to before me, this 5th day of September, 1908.

[Notarial Seal] M. L. PETERSON,
Notary Public in and for the District of Alaska, Residing at Nome, Alaska.

Exhibit "A" [to Petition].

A. A. ALLAN, Director.
JOHN H. DUNN, Treasurer.
JOHN T. REED, Clerk.

SCHOOL BOARD.

Nome, Alaska, July 20, 1908. 190——

To the Common Council of the city of Nome, Alaska.

Gentlemen: We hereby request you to appropriate and set aside, for the use and benefit of the Public schools of Nome, out of the moneys available for school purposes, the sum of $19,000.00, said sum being required for the ensuing school year. Annexed hereto is an estimate of the amounts required for the respective purposes therein indicated.

Very respectfully yours,
SCHOOL BOARD,
By JOHN T. REED,
Clerk.

Exhibit "A."

A. A. ALLAN, Director.
JOHN H. DUNN, Treasurer.
JOHN T. REED, Clerk.

SCHOOL BOARD.

Nome, Alaska, July 20, 1908. 190——

ESTIMATES OF AMOUNT REQUIRED FOR SCHOOL PURPOSES FOR ENSUING YEAR.

Salaries	$12,825.00
Fuel	1,600.00
Supplies	1,300.00
Water	50.00
Garbage	150.00
Light	175.00
Repairs	1,600.00
Incidentals	300.00
Freight & Transfer	350.00
Printing & Typewriting	50.00
Salary due Principal Grimm	250.00
Unpaid bills of old School Board	358.48
	$19,008.48

SCHOOL BOARD,
By JOHN T. REED,
Clerk.

Exhibit "B" [to Petition].

A. A. ALLAN, Director.
JOHN H. DUNN, Treasurer.
JOHN T. REED, Clerk.

SCHOOL BOARD.

Nome, Alaska, August 25, 1908. 190——

To the Common Council of the city of Nome, Alaska.

Gentlemen: On July 20th last, we wrote you, requesting that you appropriate and set aside for the use and benefit of the public schools of Nome, out of the moneys available for school purposes, the sum of $19,000.00, for the ensuing school year. To our letter of that date, we annexed an estimate of the amounts required for the respective purposes. At the time we made the above request, we believed that we had asked for an amount sufficient to cover all requirements. We, however, now find that the amount asked for will not be sufficient. The building, not having been repaired for some seven years, was in very bad condition, both from the standpoint of security and sanitation, and as the work progressed, further work became necessary, and such further work was something that could not be foreseen.

We believe that the members of your honorable body are familiar with the condition of the building before we undertook the repairs, and that you are satisfied that such repairs were absolutely necessary, and so we do not believe that anything further need be said by us, than to state, that we require the

further sum of $1,500.00, in order that we may carry forward the work undertaken, and meet the obligations incurred therein.

Very respectfully,

SCHOOL BOARD,
By JOHN T. REED,
Clerk.

Exhibit "B."

Exhibit "C" [to Petition].

CITY OF NOME.

Office of
W. T. LUCAS,
City Clerk,
Municipal Magistrate,
Phone: Red 48.

Nome, Alaska, August 28, 1908.

Nome School Board of Education, Nome, Alaska.

Gentlemen: Enclosed herewith I send you a copy of the report of the finance committee of the Common Council.

The recommendation therein was approved at the regular meeting on August 26, 1908.

Very respectfully,

W. T. LUCAS,
Municipal Clerk.

Exhibit "C."

Nome, August 26, 1908.

To the Common Council:

Your finance committee has considered the request of the School Board of date July 25, for $19,000, and the request of August 25 for an additional $1,500 to cover the cost of extensive repairs, and as the school

building was in a deplorable state, unsanitary and unsafe, and its rehabilitation a matter of necessity, we would recommend that the request of the School Board for $20,500 to be made available for school purposes be granted, with the following exception:

That inasmuch as members of the past School Board illegally withdrew from the funds an amount larger than the sum of the unpaid bills of the old School Board, the Board should require restitution of the misappropriated funds, and not ask that the City Council out of the people's money make good the shortage.

And inasmuch as the sum of approximately three thousand dollars has in the past been illegally withdrawn from the school funds, that this amount be deducted from the amount to be made available for school purposes for the current year, until such time as the School Board has exhausted its resources at law for the recovery of the said three thousand dollars illegally withdrawn from the funds of the school district.

We, therefore, recommend that the sum of Seventeen thousand five hundred dollars be made available for school purposes for the current year and that said sum be set aside in such amounts and at such times as the finances of the city will permit, the intent being to set aside and transfer to the Treasurer of the School Board the full amount of $17,500.00 as soon as possible.

FINANCE COMMITTEE,
By PHIL ERNST,
Chairman.

[Endorsed]: No. 1957. In the District Court, District of Alaska, Second Division. In the Matter of the Petition of A. A. Allan, John H. Dunn and John T. Reed, Constituting the School Board of Nome School District, for an Apportionment of the Federal License Moneys, etc. Petition. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Sep. 5, 1908. Jno. H. Dunn, Clerk. By ———, Deputy. John T. Reed, Attorney for Petitioners. McB.

In the District Court for the District of Alaska, Second Division.

In the Matter of the Petition of A. A. ALLAN, JOHN H. DUNN and JOHN T. REED, Constituting the School Board of the Nome School District, Alaska, for an Apportionment of the Federal License Moneys Collected by this Court, the Apportionment to be Paid to the School Board to be Expended by It for School Purposes, in Said School District.

Order [Directing Payment of Certain License Moneys to Treasurer of School Board, etc.].

On reading and filing the verified petition of A. A. Allan, John H. Dunn and John T. Reed, constituting the School Board for the Nome School District, Alaska, asking for an order of this Court, apportioning the federal license moneys collected by this Court, so that said petitioners, as such School Board, may receive fifty (50) per centum, or such other percent-

age thereof, as to this Court, or Judge thereof, may seem proper in the premises, until said petitioners as such School Board, shall receive the amount of $20,500.00, to be expended by said School Board for the due maintenance of the public schools in the said Nome School District, during the ensuing school year;

And, the Court having duly considered the facts set forth in said petition, and it appearing to the Court and Judge thereof, that the facts set forth in said petition are such as entitle the petitioners as such School Board, to the relief therein asked for; and

It further appearing to this Court, and the Judge thereof, that the case is one calling for the interposition of this Court and the Judge thereof,—

It is hereby adjudged and decreed that fifty (50) per centum of the federal license moneys collected and to be collected by this Court is a fair, reasonable and just percentage to be paid to said petitioners, as such School Board, until they have received the amount of $20,500.00 asked for, said amount to be expended by them for the due maintenance of the public schools in said Nome School District, during the ensuing school year, and,

It is hereby further ordered that upon the Clerk of this Court paying, from time to time to the Treasurer of said Town of Nome, the license moneys to be paid, according to law, by said Clerk to said Town Treasurer, that thereupon it shall be the duty of said Town Treasurer; and,

He, the said Town Treasurer, is hereby ordered upon receiving from any one of said petitioners, a

certified copy of this order, to forthwith from time to time, pay fifty (50) per centum of all license moneys received by him, the said Town Treasurer, from this Court or the Clerk thereof, to the petitioner, John H. Dunn, Treasurer of said School Board, until the sum of $20,500.00 asked for by petitioners has been paid to said Treasurer of said School Board, to be expended by said School Board for the purposes set forth in said petition.

Dated at Nome, Alaska, this 5th day of September, 1908.

ALFRED S. MOORE,
U. S. District Judge.

[Endorsed]: No. 1957. In the District Court, District of Alaska, Second Division. In the Matter of the Petition of A. A. Allan, John H. Dunn and John T. Reed, Constituting the School Board of Nome School District, Alaska, Plaintiff, for an Apportionment of the Federal License Moneys, etc., Defendant. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Sep. 5, 1908. Jno. H. Dunn, Clerk. By ————, Deputy. John T. Reed, Attorney for Petitioners. Nome, Alaska. Vol. 6, Orders and Judgments, p. 417. Comp.

In the District Court for the District of Alaska, Second Division.

No. 1957.

In the Matter of the Petition of A. A. ALLEN, JOHN H. DUNN and JOHN T. REED, Constituting the School Board of the Nome School District, Alaska, for the Apportionment of the Federal License Money Collected by this Court, the Apportionment to be Paid to the School Board to be Expended by It for School Purposes of Said School District.

Motion to Set Aside and Vacate Order of September 5, 1908.

Comes now the Town of Nome, a municipal corporation of the District of Alaska, and moves this Honorable Court that the order in the above-entitled cause signed and filed the 5th day of September, 1908, be vacated and set aside, said order in words and figures being as follows, to wit:

"It is hereby adjudged and decreed that fifty (50) per centum of the federal license money collected and to be collected by this court is a fair, reasonable and just percentage to be paid to said Petitioners, as such School Board, until they have received the amount of $20,500 asked for, said amount to be expended by them for the due maintenance of the public schools in Nome School District, during the ensuing school year; and

"It is hereby further ordered that upon the Clerk of this court paying, from time to time to the Treas-

urer of said Town of Nome, the license money to be paid, according to law, by said Clerk to said Town Treasurer; and,

"He, the said Town Treasurer, is hereby ordered upon receiving from any one of said petitioners, a certified copy of this order, to forthwith from time to time, pay fifty (50) per centum of all license money received by him, the said Town Treasurer, from this Court, or the Clerk thereof, to the petitioner, John H. Dunn, Treasurer of said School Board, until the sum of $20,500 asked for by Petitioners, has been paid to said Treasurer of said School Board to be expended by said School Board for the purposes set forth in said Petition."

This motion is made upon the following grounds, to wit:

I.

That the Court had no jurisdiction over the Town of Nome, the party entitled to and the owner of the money referred to in said order, nor over the Treasurer of said town, for the reason that neither of said parties had been summoned to appear in court, nor in any other way notified of the proceeding, nor afforded an opportunity of a hearing in the matter.

II.

That the Court has no jurisdiction over the subject of the action or proceeding.

This motion is based upon all the files and records of this court in the above-entitled proceeding.

JOHN RUSTGARD,
Attorney for Town of Nome.

In the District Court for the District of Alaska, Second Division.

No. 1957.

In the Matter of the Petition of A. A. ALLEN, JOHN H. DUNN and JOHN T. REED, Constituting the School Board of the Nome School District, Alaska, for the Apportionment of the Federal License Money Collected by This Court, the Apportionment to be Paid to the School Board to be Expended by It for School Purposes of Said School District.

Notice of Motion to Vacate Order Filed September 5, 1908.

To A. A. Allen, John H. Dunn and John T. Reed, Constituting the School Board of Nome School District, and to John T. Reed, Their Attorney:

Please take notice that at the courthouse in Nome, Alaska, on Saturday, the 12th day of September, 1908, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, the Town of Nome, a municipal corporation, will move the Court for an order vacating and setting aside that certain order signed and filed herein on the 5th day of September, 1908, apportioning fifty per cent of the federal license money collected by the clerk of court within the municipality of Nome to the School Board of the Nome School District, and directing that the Treasurer of the Town of Nome pay such percentage of such license money to said School Board until Twenty

Thousand, Five Hundred Dollars has been so paid.

This motion is based upon the grounds—

I.

That the Court had no jurisdiction over the Town of Nome, the party entitled to and the owner of the money referred to in said order, nor over the Treasurer of said town, for the reason that neither of said parties had been summoned to appear in court or in any other way been notified of the proceeding, nor afforded an opportunity of a hearing in the matter.

II.

That the Court has no jurisdiction over the subject of the action of proceeding.

Said motion will be based upon all the files and records in this court in the above-entitled proceeding.

A copy of said motion is hereto attached and herewith served upon you.

Dated Nome, Alaska, September 8, 1908.

JOHN RUSTGARD,
Attorney for Town of Nome.

I, John Rustgard, Attorney for Town of Nome, hereby certify that on this 8th day of September, 1908, at 9:40 o'clock A. M., in the office of John T. Reed, *he* served the foregoing motion and notice of motion upon said John T. Reed by delivering to and leaving with him true and correct copies thereof, said John T. Reed being the clerk of and the attorney for the School Board of the Nome District, the petitioner in said proceedings.

JOHN RUSTGARD,
Atty. for Town of Nome.

[Endorsed]: No. 1957. Orig. In the District Court for the District of Alaska, Second Division. In the Matter of the Petition of A. A. Allen, John H. Dunn and John T. Reed, Constituting the School Board of the Nome School District, Alaska, for the Apportionment of the Federal License Money Collected by this Court, the Apportionment to be Paid to the School Board to be Expended by it for School Purposes of Said School District. Motion to Set Aside and Vacate Order of September 5, 1908, and Notice of Motion to Vacate Order. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Sep. 8, 1908. Jno. H. Dunn, Clerk. By ————, Deputy. L. John Rustgard, Attorney for Town of Nome. L.

In the District Court for the District of Alaska, Second Division.

In the Matter of the Petition of A. A. ALLAN, JOHN H. DUNN and JOHN T. REED, Constituting the School Board of the Nome School District, Alaska, for an Apportionment of the Federal License Moneys Collected by this Court, the Apportionment to be Paid to the School Board to be Expended by It for School Purposes in Said School District.

Order Vacating and Setting Aside Former Order and Order to Show Cause.

A. A. Allan, John H. Dunn and John T. Reed, constituting the School Board of the Nome School District, Alaska, having heretofore and on the 5th

day of September, 1908, presented a petition to the Court praying for an order apportioning the federal license moneys collected by this Court, so that your petitioners, as such School Board, may receive fifty (50) per centum, or such other percentage thereof, as your Honor may deem proper in the premises, until your petitioners receive the full amount of $20,500.00 asked for of said Common Council, in order that your petitioners may fulfill the contracts they have made as aforesaid, and pay the indebtedness already incurred during the ensuing school year for the maintenance of the school in the said Nome School District, and the Treasurer of the Town of Nome, by said order, be directed to pay directly to your petitioners, as such School Board, to be used by said Board for school purposes, as above set forth, fifty (50) per centum, or such other percentage as your Honor may deem proper in the premises, of all federal license moneys paid under the law to him, the said Treasurer of the said Town of Nome, by this Court, or the clerk thereof, until said sum of $20,500.00 is fully paid to your petitioners, as such School Board, by said treasurer of the said Town of Nome, and that said fifty (50) per centum, or other percentage as may be determined by your Honor, be paid to the treasurer of the said School Board, for the use of said School Board in the due maintenance of the public school in said Nome School District, by said Treasurer of the said Town of Nome, as fast as he, the said Treasurer of the Town of Nome, shall receive the said license moneys from this Court, or the Clerk thereof, and that

certified copy of the order granted and issued by your Honor, upon this petition, when served by said petitioner, said John H. Dunn, the Treasurer of said School Board, or by anyone of your petitioners, upon the Treasurer of the said Town of Nome, shall be authority for the said Treasurer of the said Town of Nome, and it shall be his duty to forthwith pay to your petitioners, through the said John H. Dunn, Treasurer of said School Board, said fifty (50) per centum, or other percentage of said license moneys, as may be determined by your Honor, as fast as said license moneys are received by the said Treasurer of the Town of Nome, from this Court, or the Clerk thereof, until the said amount of $20,500 be paid your petitioners, to be expended by your petitioners, as such School Board, during the ensuing year, for the maintenance of the school in the said Nome School District, and for such other and further order and relief as to your Honor may seem just and proper in the premises, which said petition was on said day, filed with the Clerk of the court, and the Court on said day made an order in the premises, directing that fifty (50) per centum of the federal license moneys collected and to be collected by this Court, is a fair, reasonable and just percentage to be paid to said petitioners as such School Board, until they have received the amount of $20,500.00 prayed for, said amount to be expended by them for the due maintenance of the public school in said Nome School District, during the ensuing school year; and

That upon the Clerk of this court paying from time to time to the Treasurer of the said town of Nome the license moneys to be paid according to law by said Clerk, *said Clerk* to said Town Treasurer, that thereupon it shall be the duty of the said Town Treasurer, and upon receiving from any one of said petitioners, a certified copy of this order to forthwith, from time to time, pay fifty (50) per centum of all license moneys received by him, the said Town Treasurer, from this Court, or the Clerk thereof, to the petitioner, John H. Dunn, Treasurer of said School Board, until the sum of $20,500.00 prayed for by petitioners, has been paid to said Treasurer of said School Board, to be expended by said School Board for the purposes set forth in said petition.

Now, at this time, the Court having further considered the petition and order so made, and being more fully advised in the premises,

It is ordered and adjudged that said order so made and entered in the premises on the said 5th day of September, 1908, be and the same is hereby vacated and set aside; and,

The said verified petition of the said A. A. Allan, John H. Dunn and John T. Reed, constituting the School Board of the Nome School District, Alaska, now being before the Court for consideration, and it appearing therefrom that the petitioners are entitled to have an order citing the members of the Common Council of the town of Nome to be and appear before this Court and show cause, if any there

be, why the prayer of the said petitioners should not be granted,

It is therefore ordered and adjudged that Conrad Freeding, Phil Ernst, Thorulf Lehman, A. C. Craig, Joseph Chilberg, John H. Mustard and Chas. F. Rice, constituting the Common Council of the town of Nome, be and appear before this Court for the District of Alaska, Second Division, on Saturday, September 12th, 1908, at ten o'clock in the forenoon of said day, to show cause, if any there be, why the sum of $20,500.00 should not be apportioned to the School Board, out of the federal license moneys collected and to be collected by this Court, or the clerk thereof, for the due maintenance of the public school of the Nome School District, during the ensuing year, and that fifty (50) per centum of all license moneys received and to be received from this Court, or the clerk thereof, to be paid to John H. Dunn, Treasurer of said School Board, until the sum of $20,500.00, prayed for by petitioners, has been paid to said Treasurer of said School Board, to be expended by said School Board for the purposes aforesaid.

It is further ordered that a copy of said petition together with a copy of this order be served upon the several members constituting the Common Council of the town of Nome.

Done in open court this 10th day of September, 1908.

ALFRED S. MOORE,
District Judge.

United States of America,
District of Alaska,
Second Division,—ss.

I hereby certify that I received the annexed "Order Vacating and Setting Aside Former Order and Order to Show Cause" on the 11th day of September, 1908, and thereafter on the same date I served the same at Nome, Alaska, upon Conrad Freeding, Joseph Chilberg, A. C. Craig, Phil Ernst, Thorulf Lehmann and C. F. Rice by delivering to and leaving with each of them a copy thereof, certified to be such by John H. Dunn, Clerk of the District Court for the Second Division, District of Alaska.

And thereafter on the same date I served the same at Nome, Alaska, upon J. H. Mustard by leaving at his usual place of abode in Nome, Alaska, a copy thereof, certified to be such by John H. Dunn, Clerk of the District Court for the Second Division, District of Alaska.

Returned this 11th day of September, 1908.

T. C. POWELL,
United States Marshal.

MARSHAL'S COSTS:

7 Services........................$42.00

[Endorsed]: Original. No. 1957. In the District Court, District of Alaska, Second Division. In the Matter of the Petition of A. A. Allan, John H. Dunn and John T. Reed, Constituting the School Board for the Nome School District, Alaska, for an Apportion-

ment of the Federal License Moneys, etc. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Sep. 10, 1908. Jno. H. Dunn, Clerk. By ———, Deputy. C. S. Hannum, Attorney for Petitioners. 2732. McB.

In the District Court for the District of Alaska, Second Division.

No. 1957.

In the Matter of the Petition of A. A. ALLEN, JOHN H. DUNN and JOHN T. REED, Constituting the School Board of the Nome School District, Alaska, for an Apportionment of the Federal License Money Collected By This Court, the Apportionment to be Paid to the School Board to be Expended by It for School Purposes of Said School District.

Answer and Return of the Common Council of the Town of Nome to the Petition and the Court's Order to Show Cause Herein.

Comes now the Common Council of the town of Nome, in response to the order of the Court issued herein September 10, 1908, and served on the 11th day of September, 1908, requiring the members of the said Common Council to show cause why the petition in the above-entitled cause should not be granted, as cause and reasons why said petition or any portion thereof, either as prayed for or otherwise, should not be granted, show and represent to this Honorable Court—

1. That the Court has no jurisdiction over the subject of the action or proceeding, and it is entirely a matter of discretion with the Common Council of the town of Nome to determine what funds are available for school purposes within said town.

2. That the town of Nome is a party interested and a necessary party to this proceeding, if the Court has jurisdiction at all.

3. That the petitioners are not parties interested and have not the capacity to sue.

4. That the petition herein does not state facts sufficient to constitute a cause of action against the town of Nome or any of its officers, nor sufficient to entitle the petitioners to the relief prayed for, or any other relief.

5. That the town of Nome is a municipal corporation existing under and by virtue of the provisions of the Act approved April 28, 1904, entitled "An Act to Amend and Codify the Laws Relating to Municipal Corporations in the District of Alaska," and acts amendatory thereto, and is exercising the duties and functions created by said acts.

6. That under and pursuant to such acts, it is the duty and privilege of the Common Council of the town of Nome to establish one or more school districts, and to provide the same with suitable schoolhouses, and to provide the necessary funds for the maintenance of schools. That the amount of money to be available for school purposes in the town of Nome during the ensuing year will depend upon the

financial condition of the town, the success with which taxes are collected and the needs from time to time of the various departments of the municipal government, and that, therefore, the amount available for schools is dependent entirely upon future contingencies; nor can it be determined at the present time how large a percentage of the money available for school purposes will be needed for constructing, equipping, repairing and renovating schoolhouses and kindred duties devolving upon the Common Council.

7. That since the creation and establishment of the said Nome School District, the Treasurer of said school district has unlawfully paid out of the funds in his hands as such Treasurer and belonging to said school district, between $3,000.00 and $4,000.00 in the form of salaries to members of the said School Board for the performance of their duties as such members; that the said sum of more than $3,000.00 was so illegally abstracted and misappropriated by one of the present members and various of the former members of said board; that said sum so misappropriated is now due and owing the said Nome School District and it is the duty of the petitioners on behalf of the said school district to institute legal proceedings against the former Treasurer of the Nome School District and his bondsmen to recover said sum; but they decline to do so.

That the item of $250.00 for "salary due Principal Grim," and the item of $358.48, "unpaid bills of old School Board," are bills incurred last school year,

and for the payment of which the Council provided ample funds and placed such funds in the hands of the Treasurer of the school district, but more than sufficient to pay said items was illegally appropriated to their own personal and private use by the members of said board; one of whom is a member of the said board as now constituted; and it is the duty of the said School Board to take the proper legal steps to recover for the said school district the misappropriated funds; but the petitioners decline to do so.

9. That the School Board of the Nome School District on the 16th day of June, 1908, filed a petition in the above-entitled court for an order requiring the Common Council of the town of Nome to turn over to the Treasurer of said School Board sufficient funds to pay said bills in Section 8 last above mentioned, the same being Cause No. 1917 in this court, but said petition was denied and refused by this Court and the order denying and refusing said petition has not been vacated or set aside but is in full force and effect.

10. That the Common Council of the town of Nome has at no time refused to provide the necessary funds for the maintenance of proper schools in the said Nome school district, and on Monday the 7th day of September the said Common Council appropriated the sum of $3,000.00 for school purposes, and ordered the same to be paid to the Treasurer of the Nome school district.

11. That the town of Nome was one year ago indebted on outstanding and unpaid warrants, in the

sum of more than $45,000.00, and is still indebted in the sum of approximately $5,000.00; that during the last three months and up to the 8th day of September, 1908, there has been no revenues of any consequence derived by the town of Nome except from federal licenses, and these were not during the last summer paid to the Treasurer of the town of Nome as fast as collected by the Clerk of Court, as has been the custom heretofore, but were withheld by said Clerk, who is also Treasurer of the said School Board and one of the petitioners herein, until the 8th day of September, 1908, when he paid the said Town Treasurer some $10,000.00 of such license moneys, and that the reason the Council did not appropriate and turn over to the School Board the said $3,000.00 at an earlier date was due to the fact that such money was not needed by the School Board at an earlier date, and to the further fact that there were no moneys in the municipal treasury, which again was due to the fact that said federal license money was so withheld, as above stated, by the Clerk of this Court. That in the future it is the intention of the Common Council to turn over to the School District all money they deem available for the maintenance of schools, as fast as such moneys are received by the Treasurer of the town of Nome.

Wherefore, the Common Council of the town of Nome pray that the petition herein, and every part and portion thereof, be refused and denied by this Honorable Court, and that the petitioners herein take nothing by this action, and that this proceeding be

dismissed and the Common Council of the town of Nome have their costs and disbursements herein.

Dated this 12th day of September, 1908.

JOHN RUSTGARD,
Municipal Attorney for Town of Nome.

United States of America,
District of Alaska,—ss.

I, Conrad Freeding, being first duly sworn, depose and say that I am the President of the Common Council and ex-officio Mayor of town of Nome, and that I believe the foregoing answer and return is true.

CONRAD FREEDING.

Subscribed and sworn to before me this 12th day of September, 1908.

[Notarial Seal] JOHN RUSTGARD,
Notary Public for the District of Alaska.

United States of America,
District of Alaska,—ss.

Due service of the within Answer and Return is hereby accepted, in the District of Alaska, this fourteenth day of September, 1908, by receiving a duly certified copy of the same.

C. S. HANNUM,
Attorney for Petitioners.

[Endorsed]: No. 1957. In the District Court for the District of Alaska, Second Division. In the Matter of the Petition of A. A. Allen, John H. Dunn and John T. Reed, Constituting the School Board of the Nome School District, Alaska, for an Appor-

tionment of the Federal License Money Collected by this Court, the Apportionment to be Paid to the School Board to be Expended by it for School Purposes of said School District. Answer and Return of the Common Council of the Town of Nome to the Petition and the Court's Order to Show Cause Herein. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Sep. 14, 1908. Jno. H. Dunn, Clerk. By ————, Deputy. John Rustgard, Attorney for ————. McB.

In the District Court for the District of Alaska, Second Division.

In the Matter of the Petition of A. A. ALLAN, JOHN H. DUNN and JOHN T. REED, Constituting the School Board of the Nome School District, Alaska, for the Apportionment of the Federal License Moneys Collected by this Court, the Apportionment to be Paid to the School Board to be Expended for School Purposes, in said School District.

Reply.

Comes now the petitioners in the above-entitled matter, and for a Reply to the Answer and Return of the Common Council of the town of Nome,—

I.

Deny each and every allegation alleged and set forth in Paragraphs One, Two, Three and Four therein.

II.

Deny each and every allegation contained in Para-

graph Six of said Answer and Return, except as hereinafter alleged.

III.

Petitioners replying to the seventh paragraph of said Answer and Return, deny that your petitioners, constituting the School Board for the Nome School District, or the Treasurer thereof, has unlawfully paid out of the funds in the hands of such Treasurer of said School Board, between Three (3) and Four (4) Thousand Dollars, or any other sum or amount whatsoever, in the form of salaries to members of such School Board, or for any other purpose whatsoever, or at all, except for the maintenance of the Public School.

IV.

Deny that said sum so alleged in Paragraph Seven to have been misappropriated is now due or owing said School District, or your petitioners, or that said sum or any part thereof is available for school purposes, and deny that it is the duty of the petitioners on behalf of said School District to institute legal proceedings against the former Treasurer of the Nome School District, to recover said sum, or any part thereof, or that they have as such School Board declined to do so.

V.

Your petitioners answering the Eighth Paragraph of said Answer and Return allege: That the items of Two Hundred and Fifty ($250) Dollars due the principal of the school, and the item of Three Hundred and Fifty-eight ($358) Dollars, unpaid bills, mentioned in said Paragraph Eight, are bona fide

existing indebtedness, due and owing from the Nome School District, and that the creditors holding said claims against said Nome School District are entitled to be paid, regardless of any malfeasance in office of the former members of the School Board, or the Treasurer thereof, and regardless as to whether or not the members of the former School Board, or the Treasurer thereof, appropriated to their own personal or private use, any sum of money whatsoever.

VI.

The petitioners replying to the Ninth Paragraph of said Answer and Return, deny that the present School Board of the Nome School District did, on the 16th day of June, 1908, or at any other time, or at all, other than as set forth in their petition in this proceeding, file a petition in the above-entitled court, praying for an order requiring the Common Council of the town of Nome to turn over to the Treasurer of said School Board sufficient funds to pay said bills mentioned in said Paragraph Eight of said Answer and Return, and deny that this Honorable Court ever denied the prayer of any petition in any proceedings before him, wherein the present School Board of the Nome School District, as now constituted, was a party to the proceedings.

VII.

Deny each and every allegation, matter and thing alleged and set forth in Paragraph Ten of said Answer and Return, except as hereinafter alleged.

VIII.

Deny each and every allegation, matter and thing

alleged and set forth in Paragraph Eleven of said Answer and Return, except as hereinafter alleged.

IX.

Your petitioners, for a further Reply to the Answer and Return of the said Common Council, allege:

That the Clerk of the District Court for the District of Alaska, Second Division, did, on the 6th day of June, 1908, pay to the Treasurer of the Town of Nome, out of the federal license moneys provided for by Act of Congress approved March 3d, 1899, $3,380, and on the 20th day of June, 1908, the further sum of $5,325, and on the 6th day of September, 1908, the further sum of $10,120.70, making a total sum of $18,825.70.

X.

That the said Common Council for the town of Nome has neglected and refused, and still neglects and refuses, to set aside or appropriate any part of the said several sums so paid, for support and maintenance of the Public School of the town of Nome, and your petitioners are informed and verily believe, and upon their information and belief allege, that the said Common Council paid out and expended all of said money so paid to the Town Treasurer by the Clerk of the District Court, for purposes other than for the support and maintenance of the public school.

XI.

Your petitioners for a further Reply to the Answer and Return of the Common Council of the town of Nome allege: That if it be true that the said Common Council of the town of Nome did, on Monday, the 7th day of September, 1908, appropriate the sum

of Three Thousand ($3,000) Dollars for school purposes, and ordered the same to be paid to the Treasurer of the Nome School District, as alleged and set forth in Paragraph Ten of said Answer and Return, that at the time they so appropriated said money there were no funds in the hands of the Town Treasurer, or under the control of the Common Council, with which to meet said appropriation, and your petitioners further allege that since they have been so advised that said sum of Three Thousand ($3,000) Dollars had been so appropriated as alleged and set forth in Paragraph Ten of said Answer and Return, that the Treasurer of the School Board of the Nome School District, has repeatedly called upon the Clerk of the town of Nome for a warrant upon the Treasurer of the town of Nome, for the amount of Three Thousand ($3,000) Dollars, but that the said Town Clerk of the town of Nome has neglected and refused, and still does neglect and refuse, to issue and deliver to the Treasurer of the School Board a warrant upon the Town Treasurer for the said Three Thousand ($3,000) Dollars, or any part thereof, and that said Treasurer of the Nome School District since being so advised that said appropriation of Three Thousand ($3,000) Dollars had been made, has repeatedly called upon the Treasurer of the town of Nome and demanded the payment of said sum of Three Thousand ($3,000) Dollars, but the said Treasurer of the town of Nome has failed, neglected and refused, and still does fail, neglect and refuse, to pay to the Treasurer of the Nome School District, the

said sum of Three Thousand ($3,000) Dollars, or any part thereof.

XII.

Your petitioners further replying to said Answer and Return allege, represent and show that the balance on hand in the Treasury of the School Board is Sixty-three Dollars and Ninety-seven Cents ($63.97), and that they are informed and verily believe, and upon their information and belief allege, that the Common Council of the town of Nome has disbursed the entire amount of federal license moneys paid to it by the Clerk of the District Court for the District of Alaska, Second Division, and that there are no available funds in the hands of, or under the control of the said Common Council with which to maintain the public schools of the Nome School District, and that it has no funds with which to meet its appropriation of Three Thousand ($3,000) Dollars, so alleged to have been made for school purposes, as set forth in the Tenth Paragraph of said Answer and Return.

XIII.

Your petitioners further replying to said Answer and Return allege: That they are informed by the Clerk of the District Court for the District of Alaska, Second Division, and verily believe that the entire amount of federal license moneys to be collected between the 15th day of September, 1908, and the end of the ensuing fiscal school year will not exceed the sum of Twenty-five Thousand ($25,000) Dollars, and that fifty (50) per centum of said license money so to be collected will be insufficient to support and

maintain the public school of the Nome School District during the ensuing school year.

XIV.

Your petitioners further allege: That the Common Council of the town of Nome have no way or means to provide the funds sufficient to maintain and support the Public School of the Nome School District, except from the federal license moneys received from the Clerk of the District Court of the Second Division, taxes levied and assessed against the assessable property within the limits of the town of Nome, and such fines as may be collected by the municipal court, and that your petitioners are informed and believe, and upon their information and belief allege, that the entire revenue of the said town of Nome will be insufficient to meet the expenses incurred by said Common Council for municipal purposes, and unless this Honorable Court, exercising the power and authority invested in it, orders and directs that fifty (50) per centum of the federal license moneys to be collected by the Clerk of this Court, and paid to the said Common Council, be paid to the Treasurer of the School Board of the Nome School District, that your petitioners will be compelled to close the public schools of Nome School District for want of funds with which to support and maintain them.

XIV.

Your petitioners further allege that by reason of the failure, neglect and refusal of the Clerk of the town of Nome to draw the warrant in favor of the Treasurer of the School Board for the said Three Thousand ($3,000) Dollars, so alleged to have been

appropriated by the said Common Council for school purposes, and the failure, neglect and refusal of the Treasurer of the town of Nome to pay to the Treasurer of the School Board of the Nome School District, the said Three Thousand ($3,000) Dollars so alleged to have been appropriated for school purposes, that the School Board of the Nome School District is entirely without funds, save and except the $63.97 with which to pay the current expenses necessary to maintain the public school of the Nome School District, and have no money, or means of obtaining money with which to pay for the necessary improvements made upon said school building, as alleged and set forth in their petition and pay for the necessary school supplies, which have been purchased, as set forth in said petition.

XV.

Your petitioners further allege: That they are informed and believe, and upon their information and belief state, that the majority of the members of the Common Council of the town of Nome have openly stated and asserted that the Nome School Board will never receive one dollar of the federal license moneys to be collected and paid to the Treasurer of the town of Nome, as above set forth, until such time as the Circuit Court of Appeals for the Ninth Circuit shall have determined by its order, judgment and decree that this Honorable Court has the right to determine by order, the amount of federal license money so to be paid to the Treasurer of the School Board for school purposes, and that it will withhold all of said federal license moneys from the Treasurer of the

said School Board, until the said Ninth Circuit, Court of Appeals, shall have determined by its order and decree the questions involved in these proceedings.

XVI.

Your petitioners further allege: That the Common Council of the town of Nome have refused, and will continue to refuse, to appropriate sufficient sum of money to maintain the public school of the Nome School District, until the School Board of the Nome School District institutes one or more actions at law to recover from former members of the School Board and their bondsmen certain sums of money, claimed by the members of the Common Council to have been illegally paid out and misappropriated, and that by reason of the threatened action on the part of the Common Council, the public school of the Nome School District will suffer irreparable injury, and that the Nome School Board will be unable, by reason of said threatened action of the Common Council, to conduct and carry on the public school of the Nome School District, and that in order to enable the said School Board to maintain the said public school, it will be necessary that this Honorable Court make an order directing that at least fifty (50) per centum of the entire license moneys collected for this fiscal school year be set aside and paid to the Treasurer of said School Board, or sufficient amount thereof to make the sum of $20,500.00, determined by said School Board to be necessary to support and maintain said public school.

XVII.

Your petitioners further replying to the allega-

tions set forth in Paragraph Eleven of the Answer and Return of the Common Council, allege: That the ten thousand dollars federal license moneys mentioned in said paragraph was not withheld by the Clerk of this Court for the purpose of harassing, annoying or in any other manner interfering with the Common Council of the town of Nome, nor was the same withheld in the interest of the School Board of the Nome School District, and that the payment of the same to the Town Treasurer was delayed by reason of the absence of the Judge of this Court from the District, and that said money was turned over to the Town Treasurer shortly after the return of the Judge of this Court, and the orders directing its payment were made according to the due course and practice of this Court.

Wherefore your petitioners pray for the relief demanded in their petition, and that the order prayed for in said petition be drawn so as to direct and require that out of the first federal license moneys collected, which are required by law to be paid by the Clerk of this court to the Town Treasurer, that in addition to fifty (50) per centum of the moneys so to be paid, that out of future payments of said license moneys a further sum of $9,412.85 be paid to the Treasurer of the School Board, said sum being equal to one-half (½) of the amount of federal license moneys heretofore paid by the Clerk of the Court to said Town Treasurer as above set forth, no part of which was appropriated for school purposes, and that the Common Council pay to the Treasurer of the School Board for the Nome School

District fifty (50) per centum of all further federal license moneys, until the said Treasurer of the School Board shall have received the just and full sum of $20,500.00 as prayed for in their petition, and for such and further order as may be just and equitable in the premises.

[Notary Seal] C. S. HANNUM,

Attorney for Petitioners.

United States of America,
District of Alaska,—ss.

I, John T. Reed, being first duly sworn, depose and say that I am one of petitioners in the above-entitled matter, and that the foregoing reply is true, as I verily believe.

JOHN T. REED.

Subscribed and sworn to before me this 15th day of Sept., 1908.

[Notarial Seal] C. S. HANNUM,

Notary Public for the District of Alaska.

[Endorsed]: Original. No. 1957. In the District Court, District of Alaska, Second Division. In the Matter of the Petition of A. A. Allen, John H. Dunn and John T. Reed, Constituting the School Board for the Nome School District for an Apportionment of the Federal License Moneys, etc. Reply. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome, Sep. 15, 1908. Jno. H. Dunn, Clerk. By ————, Deputy. C. S. Hannum, Attorney for Petitioners.

In the District Court for the District of Alaska, Second Division.

In the Matter of the Petition of A. A. ALLEN, JOHN H. DUNN, and JOHN T. REED, Constituting the School Board of the Nome School District, Alaska, for an Apportionment of the Federal License Moneys Collected by this Court, the Apportionment to be Paid to the School Board to be Expended by It for School Purposes, in the Said School District.

Order [Filed October 9, 1908].

A. A. Allan, John H. Dunn and John T. Reed, constituting the School Board of the Nome School District, Alaska, having heretofore and on the 5th day of September, 1908, filed their petition praying for an order apportioning the federal license moneys collected by the Clerk of this Court, so that the said petitioners as such School Board may receive fifty (50) per centum or such other per centum thereof as to the Court might seem proper in the premises, until the petitioners have received $20,500, with which to enable the said School Board to pay the indebtedness against the School District and for the due maintenance of the public schools of said District, during the school year next ensuing, and the Court having heretofore and on the 10th day of September, 1908, made an order directing that Conrad Freeding, Phil Ernst, Thorulf Lehman, A. C. Craig,

Joseph Chilberg, John H. Mustard and Chas. F. Rice, constituting the Common Council of the Town of Nome, be and appear before this Court on Saturday, September 12th, 1908, at ten o'clock in the forenoon of said day, to show cause, if any there be, why said sum of $20,500 should not be apportioned to the said School Board out of the federal license moneys collected and to be collected by the Clerk of this Court, as prayed for in said petition of said School Board;

That thereafter, and on the 12th day of September, 1908, the hearing on said order to show cause was continued to the 15th day of September, 1908, at which time this matter came on regularly to be heard, C. S. Hannum, Esquire, appearing as attorney for the Nome School Board, and John Rustgard, Esquire, appearing as attorney for the Common Council of the Town of Nome, and after hearing the argument of counsel, the matter was submitted to the Court for consideration and decision, upon the verified petition of said Nome School Board, the Answer and Return of the said Common Council, and the Reply of the petitioners, and the Court having fully considered the same and now being fully advised in the premises, finds,

I.

That the sum of $20,500 is the proper amount to be apportioned for the use of the School Board for the purpose of enabling the Board to pay the indebtedness against the School District, and for the due maintenance of the Nome Public Schools for the ensuing school year.

II.

That on the 26th day of August, 1908, the Finance Committee of the Common Council of the Town of Nome recommended that the request of the Nome School Board, that the $20,500 be made available for school purposes for the ensuing school year, be granted, and that said sum be made available for such purpose with the following exception, that Three Thousand ($3,000) Dollars thereof be deducted from the amount so to be made available for school purposes for the current year, until such time as the School Board has exhausted its resources at law to recover the sum of Three Thousand ($3,000) Dollars, claimed by said Common Council to have been illegally withdrawn from the funds of the School District by members of former School Boards.

III.

That on the 29th day of August, 1908, the recommendation of the Finance Committee of the Common Council of the Town of Nome, was regularly approved by the members of the said Common Council in regular meeting assembled, and that by reason of the action of said Common Council only $17,500 was made available for school purposes, and that Three Thousand ($3,000) Dollars of said sum of $20,500 is not available for school purposes, the same being made dependent upon action of said petitioners to recover the said sum of Three Thousand ($3,000) Dollars, claimed by said Common Council to have been illegally expended by former members of the School Board.

IV.

That said sum of Three Thousand ($3,000) Dollars, in addition to said sum of $17,500, should be made available for school purposes for the ensuing school year, without regard to any liability of former members of the Nome School Board, to the Nome School District.

Now, therefore, by reason of the law and the facts and the power and authority vested in the Court by statutes in such cases made and provided,

It is ordered and adjudged that the Common Council of the Town of Nome be, and it is hereby, ordered and directed to set apart, apportion and pay over to the Treasurer of the Nome School Board, for school purposes for the ensuing school year, the additional sum of Three Thousand ($3,000) Dollars from the federal license moneys now in the hands of the Clerk of this Court, or hereinafter to come into his hands as such Clerk and by him paid over to the Common Council of the Town of Nome.

Done in open court this 5th day of October, 1908.

ALFRED S. MOORE,
Judge of the District Court.

United States of America,
District of Alaska,
Second Division,—ss.

I hereby certify that I received the annexed order on the 16th day of November, 1908, and thereafter on the same date I served the same at Nome, Alaska, upon Conrad Freeding, Thorulf Lehmann, A. C. Craig, J. H. Mustard, Phil Ernst and Jos. Chilberg;

and thereafter, on the 18th day of November, 1908, I served the same at Nome, Alaska, upon C. F. Rice, by delivering to and leaving with each of them a copy thereof, certified to be such by Jno. H. Dunn, Clerk of the District Court, District of Alaska, Second Division.

Returned this 19th day of November, 1908.

T. C. POWELL,
United States Marshal.
By C. H. Hawkins,
Deputy.

MARSHAL'S COSTS.

7 Services $42.00

[Endorsed]: Original. No. 1957. In the District Court, District of Alaska, Second Division. In the Matter of the Petition of A. A. Allan, John H. Dunn and John T. Reed, Constituting the School Board for the Nome School District for an Apportionment of the Federal License Moneys, etc. Order. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Oct. 9, 1908. Jno. H. Dunn, Clerk. By ————, Deputy. C. S. Hannum, Attorney for Petitioners. Vol. 6, Orders and Judgments, p. 483. Comp. 2732. McB.

In the District Court for the District of Alaska, Second Division.

No. 1957.

In the Matter of the Petition of A. A. ALLAN, JOHN H. DUNN, and JOHN T. REED, Constituting the School Board of the Nome School District, Alaska, for an Apportionment of the Federal License Moneys Collected by this Court, the Apportionment to be Paid to the School Board to be Expended by It for School Purposes, in Said School District.

Exception of the Common Council to the Court's Order Filed October 9th, 1908.

Comes now John Rustgard, Esquire, as attorney for the Town of Nome and the Common Council of the town of Nome, and excepts to the order of the Court filed at this time directing the Common Council of the Town of Nome to pay to the Treasurer of the Nome School Board the additional sum of Three Thousand Dollars ($3,000) from the federal license money, on the ground that the Court has no jurisdiction over the subject of the action nor over the Town of Nome, the owner of the money in question; and for the further reason that the Court had heard no evidence relating to the matter and that the order has no warrant in law, and is not justified under the pleadings.

Said John Rustgard, as such attorney for the Town of Nome and the Common Council of the Town of Nome, also excepts to the finding contained in said order and marked I, for the reason that no evidence has been submitted to the Court in relation to the matter.

Said John Rustgard, as such attorney for the town of Nome and the Common Council of the Town of Nome, also excepts to the finding set out in said order numbered II, for the reason that no evidence has been submitted to the Court with relation to the matter.

Said John Rustgard, as such attorney for the Town of Nome, and the Common Council of the Town of Nome, also excepts to the finding contained in said order marked III, for the reason that no evidence has been submitted to the Court with reference to the matter.

Said John Rustgard, as such attorney for the town of Nome and the Common Council of the Town of Nome, also excepts to the finding contained in said order marked IV, for the reason that no evidence has been submitted to the Court with reference to the matter, and for the further reason that the subject of the action is beyond the jurisdiction of the Court, and the Court has no jurisdiction over the owner of the subject of the action, the Town of Nome.

Dated October 9th, 1908.

JOHN RUSTGARD,

Attorney for the Town of Nome and the Common Council of the Town of Nome, Alaska.

[Endorsed]: No. 1957. In the District Court for the District of Alaska, Second Division. In the Matter of the Petition of A. A. Allan, John H. Dunn, and John T. Reed, Constituting the School Board of the Nome School District, Alaska, for an Apportionment of the Federal License Moneys, etc. Exceptions of the Common Council to the Court's Order Filed October 9th, 1908. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Oct. 9, 1908. Jno. H. Dunn, Clerk. By ————, Deputy. (Z) John Rustgard, Attorney for Town of Nome and Common Council of Town of Nome. McB.

In the District Court for the District of Alaska, Second Division.

No. 1957.

In the Matter of the Petition of A. A. ALLAN, JOHN H. DUNN, and JOHN T. REED, Constituting the School Board of the Nome School District, Alaska, for an Apportionment of the Federal License Moneys Collected by this Court, the Apportionment to be Paid to the School Board to be Expended by It for School Purposes, in the Said School District.

Petition [to District Court] for Appeal [Order Unsigned].

The Common Council of the town of Nome, feeling themselves aggrieved by the decision, order and judgment, dated October 5th, 1908, and entered and

filed herein October 9th, 1908, hereby appeal from said order and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that said appeal be allowed.

Dated October 14th, 1908.

JOHN RUSTGARD,

Attorney for the Common Council of the Town of Nome, the Appellant.

ORDER.

And now, on this 14th day of October, 1908, the foregoing appeal is hereby allowed.

Done in open court this 14th day of October, 1908.

——————,

District Judge.

[Endorsed]: No. 1957. In the District Court for the District of Alaska, Second Division. In the Matter of the Petition of A. A. Allan, John H. Dunn, and John T. Reed, Constituting the School Board of the Nome School District, Alaska, for an Apportionment of the Federal License Moneys Collected by this Court, etc. Petition for Appeal and Order Allowing the Same. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Oct. 14, 1908. Jno. H. Dunn, Clerk. By ————, Deputy. (Z) John Rustgard, Attorney for Common Council of the Town of Nome.

In the District Court for the District of Alaska, Second Division.

No. 1957.

In the Matter of the Petition of A. A. ALLAN, JOHN H. DUNN, and JOHN T. REED, Constituting the School Board of the Nome School District, Alaska, for an Apportionment of the Federal License Moneys Collected by this Court, the Apportionment to be Paid to the School Board to be Expended by It for School Purposes, in Said School District.

Petition [to District Court] for Writ of Error [Order Unsigned].

The Common Council of the Town of Nome, feeling themselves aggrieved by the order and judgment herein in favor of said petitioners, dated October 5th, 1908, and filed and entered herein October 9th, 1908, ordering and adjudging that the Common Council of the Town of Nome be and hereby is ordered and directed to set apart, apportion and pay over to the treasurer of the Nome School Board, for school purposes for the ensuing school year, the additional sum of three thousand dollars from the federal license money now in the hands of the Clerk of the above-named Court, or hereafter to come into his hands as such clerk, and by him paid over to the Common Council of the Town of Nome, come now, by their attorney, John Rustgard, and petition this

Honorable Court for an order allowing the said Common Council of the Town of Nome to prosecute a writ of error from the United States Circuit Court of Appeals of the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided.

Dated October 14th, 1908.

JOHN RUSTGARD,

Attorney for the Common Council of the Town of Nome.

Let a writ of error in the above-entitled cause, as prayed for, issue.

Done in open court, this 14th day of October, 1908.

——————,

District Judge.

[Endorsed]: No. 1957. In the District Court for the District of Alaska, Second Division. In the Matter of the Petition of A. A. Allan, John H. Dunn and John T. Reed, Constituting the School Board of the Nome School District, Alaska, for an Apportionment of the Federal License Moneys Collected by This Court, etc. Petition for Writ of Error. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division at Nome. Oct. 14, 1908. Jno. H. Dunn, Clerk. By ————, Deputy. (Z) John Rustgard, Attorney for Common Council of the Town of Nome.

In the District Court for the District of Alaska, Second Division.

No. 1957.

In the Matter of the Petition of A. A. ALLAN, JOHN H. DUNN and JOHN T. REED, Constituting the School Board of the Nome School District, Alaska, for an Apportionment of the Federal License Moneys Collected by this Court, the Apportionment to be Paid to the School Board to be Expended by It for School Purposes in said School District.

Cost Bond on Error and on Appeal.

Know All Men by These Presents: That the Common Council of the Town of Nome, the plaintiff in error and appellant in the above-entitled cause, as principal, and C. G. Cowden and J. J. Cole, as sureties, are held and firmly bound unto A. A. Allan, John H. Dunn and John T. Reed, as the School Board of the Nome School District, Alaska, in the sum of two hundred and fifty dollars, to be paid to the said School Board, for the payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, administrators and executors, firmly by these presents.

Sealed with our seals and dated this 14th day of October, 1908.

The condition of this obligation is such that, whereas, the above-bounden, the Common Council

of the Town of Nome, has sued out a writ of error from the United Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and order in the above-entitled cause by the District Court for the District of Alaska, Second Division, dated October 5th, 1908, and filed for record herein on the 9th day of October, 1908, and has also appealed from said order and judgment;

Now, therefore, the condition of this obligation is such that, if the above-named, the Common Council of the Town of Nome, shall prosecute said writ of error and appeal to effect and answer all costs and damages if it fails to make its plead good, then this obligation shall be void; otherwise to remain in full force and virtue.

COMMON COUNCIL OF THE TOWN OF NOME,

By JOHN RUSTGARD,
Its Attorney.

C. G. COWDEN,
J. J. COLE,
Sureties.

Signed, sealed and delivered in the presence of:

P. H. WATT.
STOCKTON RUMSEY.

United States of America,
District of Alaska,—ss.

C. G. Cowden and J. J. Cole, being duly sworn, each for himself, under oath, deposes and says: I am a resident of the District of Alaska; am not a counsel or attorney at law, marshal, clerk of any court

or other officer of any court; that I am worth the sum of five hundred dollars over and above all just debts and liabilities, and exclusive of property exempt from execution.

C. G. COWDEN.
J. J. COLE.

Subscribed and sworn to before me this 14th day of October, 1908.

[Notarial Seal] JOHN RUSTGARD,
Notary Public for Alaska.

The above and foregoing bond is hereby approved in open court this 14th day of October, 1908.

——————,
District Judge.

[Endorsed]: No. 1957. In the District Court for the District of Alaska, Second Division. In the Matter of the Petition of A. A. Allan, John H. Dunn and John T. Reed, Constituting the School Board of the Nome School District, Alaska, for an Apportionment of the Federal License Moneys Collected by this Court, etc. Cost Bond on Error and Appeal. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome, Oct. 14, 1908. Jno. H. Dunn, Clerk. By ————, Deputy. (Z) John Rustgard, Attorney for Common Council of the Town of Nome. Civil Bonds #4, page 220. Comp.

In the District Court for the District of Alaska, Second Division.

No. 1957.

In the Matter of the Petition of A. A. ALLAN, JOHN H. DUNN and JOHN T. REED, Constituting the School Board of the Nome School District, Alaska, for an Apportionment of the Federal License Moneys Collected by this Court, the Apportionment to be Paid to the School Board to be Expended by It for School Purposes in said School District.

Assignment of Errors.

Come now the Common Council of the Town of Nome and file the following assignment of errors upon which they will rely in their prosecution of a writ of error from an appeal to the United States Circuit Court of Appeals of the Ninth Circuit, in the above-entitled cause:

I.

The Court erred in assuming and exercising jurisdiction over the subject of the action or proceeding, for the reason that the same is not within the jurisdiction of the Court—the question of determining what funds are available for school purposes within the town of Nome being a matter solely within the discretion of the Common Council of said town.

II.

The Court erred in assuming and exercising jurisdiction over the subject of the action, for the reason that the town of Nome, as owner of the funds in-

volved, is a party interested but is not a party to the proceeding.

III.

The Court erred in not dismissing the proceeding, for the reason that the petition does not state facts constituting a cause of action, or any facts entitling petitioners to any relief whatever.

IV.

The Court erred in not dismissing the proceeding, for the reason that the petitioners are not parties interested, and have no capacities to sue, the Nome School District being a corporation and the party directly interested.

V.

The Court erred in not dismissing the proceeding, for the reason that it affirmatively appears from the answer that more than the sum of Three Thousand Dollars is due and owing the Nome School District from members of the Nome School Board, and that said sum is secured by presumably valid bonds to, and in favor of, the Nome School District.

VI.

The Court erred in directing the Council to cause any money to be paid to the treasurer of the Nome School District, for the reason that it could not be determined by the Court how much of the available funds would or will have to be used by Common Council for the purpose of providing or equipping schoolhouses and other purposes, as required by subsection XII of section IV of the Act of April 28, 1904.

VII.

The Court erred in making and filing the following finding of fact embodied in said order, to wit:

"That the sum of twenty thousand five hundred dollars is the proper amount to be apportioned for the use of the School Board for the purpose of enabling the Board to pay the indebtedness against the School District, and for the due maintenance of the Nome public schools for the ensuing year."

For the reason that there was no evidence whatever submitted to the Court with reference to the matter, nor does the pleadings justify such finding.

VIII.

The Court erred in making and filing the following finding embodied in said order, to wit:

"That said sum of three thousand dollars, in addition to said sum of seventeen thousand five hundred dollars, should be made available for school purposes for the ensuing school year, without regard to any liability of former members of the Nome School Board to the Nome School District."

For the reason that no evidence was submitted to the Court in support of such finding; that the matter is within the discretion of the Common Council of the Town of Nome, and not within the jurisdiction of the Court; and for the further reason that it affirmatively appears from the answer that the School District has assets amounting to more than three thousand dollars, and that as a part of the seventeen thousand five hundred dollars is embodied the indebtedness incurred by the School Board for

the last school year in excess of the money for that year appropriated for school purposes.

IX.

The Court erred in entering and making the following order, to wit:

"It is ordered and adjudged that the Common Council of the Town of Nome be and it is hereby ordered and directed to set apart, apportion and pay over to the treasurer of the Nome School Board, for school purposes for the ensuing school year, the additional sum of three thousand dollars from the federal license money now in the hands of the Clerk of this court or hereafter to come into his hands as such clerk, and by him paid over to the Common Council of the Town of Nome."

Because it is unsupported by the evidence, is not justified by the findings, is beyond the jurisdiction of the Court, assumes, and in effect decrees, that all money available for school purposes shall be turned over to the treasurer of the School Board, whereas, the law imposes upon the Common Council the duty of using part of such funds for building and equipping schoolhouses and the acquisition of sites for the same, and imposes upon the present Council, whose term expires on the first Tuesday in April, 1909, the duty of providing funds for the School Board for approximately two months beyond their own term, to wit, until June 1st, 1909.

X.

The Court erred in directing the Common Council to pay the indebtedness of the School Board of the Nome School District for the year ending June 1st,

1909, for the reason that it affirmatively appears by the answer that such indebtedness was beyond the amount made available for school purposes for that year, and was due to the criminal misappropriation of funds by the School Board.

Wherefore, the Common Council of the Town of Nome, the plaintiff in error and appellant herein, pray that the order in the above-entitled proceeding, here above referred to, dated October 5th, 1908, and filed October 9th, 1908, ordering and adjudging that the Common Council of the Town of Nome be, and thereby is, directed to set apart, apportion and pay over to the treasurer of the Nome School Board, for school purposes for the ensuing school year, the additional sum of three thousand dollars from the federal license money now in the hands of the clerk of the said court, or hereafter to come into his hands as such clerk, and by him paid over to the Common Council of the Town of Nome, be reversed, vacated and set aside, and the above-entitled proceedings dismissed.

Dated at Nome, Alaska, October 14th, 1908.

JOHN RUSTGARD,

Attorney for the Common Council of the Town of Nome, and Plaintiff in Error and Appellant.

[Endorsed]: No. 1957. In the District Court for the District of Alaska, Second Division. In the Matter of the Petition of A. A. Allan, John H. Dunn and John T. Reed, Constituting the School Board of the Nome School District, Alaska, for an Apportionment of the Federal License Moneys Collected by this Court, etc. Assignment of Errors. Filed in the

Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome, Oct. 14, 1908. Jno. H. Dunn, Clerk. By ———————, Deputy. (Z) John Rustgard, Attorney for Common Council of the Town of Nome, and Plaintiff in Error and Appellant.

In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of the Petition of A. A. ALLAN, JOHN H. DUNN and JOHN T. REED, Constituting the School Board of the Nome School District, Alaska, for an Apportionment of the Federal License Moneys Collected by this Court, the Apportionment to be Paid to the School Board to be Expended by It for School Purposes in said School District.

The COMMON COUNCIL of the Town of Nome, District of Alaska, and CONRAD FREEDING, PHIL ERNST, THORULF LEHMAN, A. C. CRAIG and CHARLES F. RICE, as Members of and Constituting the Said COMMON COUNCIL,

Petitioners for Writ of Error.

Petition [to U. S. Circuit Court of Appeals] for Writ of Error to the District Court of the United States, District of Alaska, Second Division.

The Common Council of the Town of Nome, District of Alaska, and Conrad Freeding, Phil Ernst, Thorulf Lehman, A. C. Craig and Charles F. Rice, as members of and constituting the said Common Council, respectfully show to the Court as follows:

I.

That the Town of Nome, District of Alaska, is and was at all the times herein mentioned a municipal corporation duly incorporated, organized and existing under and by virtue of the laws of said District of Alaska.

II.

That the municipal affairs of said Town of Nome are regulated and governed by a Common Council consisting of five members elected by the inhabitants of said town of Nome in the manner prescribed by the Acts of Congress; and that Conrad Freeding, Phil Ernst, Thorulf Lehman, A. C. Craig and Charles F. Rice are now and at all times herein mentioned have been the duly elected, qualified and acting members of said Common Council of the Town of Nome.

III.

That the school affairs and the regulation of the schools of the Nome School District are under the supervision and control of the School Board elected by the inhabitants of said District in the manner prescribed by the Acts of Congress, and that A. A. Allan, John H. Dunn and John T. Reed are now and were at all times herein mentioned the members of and constitute said School Board.

IV.

That heretofore and on the 5th day of September, 1908, said A. A. Allan, John H. Dunn and John T. Reed, constituting the School Board of said Nome School District, Alaska, presented to and filed with the District Court of the United States for the District of Alaska, Second Division, a petition for a writ

of mandate for the apportionment of federal license moneys collected by the said District Court, the apportionment petitioned for to be to them, said Allen, Dunn and Reed, constituting said School Board, to be by them said School Board, expended for school purposes in said School District, a duly certified copy of which said petition is hereunto annexed, marked Exhibit "A," and made a part hereof.

V.

That thereafter and on the 10th day of September, 1908, the Honorable Alfred S. Moore, Judge of said District Court of the United States for the District of Alaska, Second Division, did in open court, in said cause aforesaid, to wit, said petition for writ of mandate, make and enter the following order to show cause,—

"The verified petition of A. A. Allen, John H. Dunn and John T. Reed, constituting the School Board of the Nome School District, Alaska, now being before the Court for consideration, and it appearing therefrom that the petitioners are entitled to have an order citing the members of the Common Council of the town of Nome to be and appear before this Court and show cause, if any there be, why the prayer of the said petitioners should not be granted:

It is therefore ordered and adjudged that Conrad Freeding, Phil Ernst, Thorulf Lehman, A. C. Craig, Joseph Chilberg, John H. Mustard and Chas. F. Rice, constituting the Common Council of the Town of Nome, be and appear before this Court for the District of Alaska, Second Division, on Satur-

day, September 12th, 1908, at 10 o'clock in the forenoon of said day, to show cause, if any there be, why the sum of $20,500 should not be apportioned to the School Board out of the federal license moneys collected and to be collected by this Court, or the Clerk thereof, for the due maintenance of the public school of the Nome School District, during the ensuing year, and that fifty (50) per centum of all license moneys received and to be received from this Court, or the Clerk thereof, to be paid to John H. Dunn, Treasurer of said School Board, until the sum of $20,500.00, prayed for by petitioners, has been paid to said Treasurer of said School Board, to be expended by said School Board for the purposes aforesaid.

It is further ordered that a copy of said petition together with a copy of this order be served upon the several members constituting the Common Council of the town of Nome."

All of which more fully appears from a duly certified copy of said order to show cause hereunto annexed and marked Exhibit "B."

VI.

That thereafter and on the 12th day of September, 1908, the said Conrad Freeding, Phil Ernst, Thorulf Lehman, A. C. Craig, and Charles F. Rice, constituting said Common Council, duly and regularly served and filed an answer to said petition and order to show cause, a copy of which said answer is hereunto annexed and marked Exhibit "C" and made a part hereof.

VII.

That thereafter and on the 15th day of September, 1908, said Allan, Dunn and Reed, constituting said School Board, served and filed their reply to said answer, a copy of which is hereunto annexed and made a part hereof and marked Exhibit "D." That on said 15th day of September, said petition for a writ of mandamus was submitted to said Court for decision, and on the 8th day of October, 1908, said Court made the following order upon the journal of the Court:

"October 8, 1908.

#1957.

SCHOOL BOARD OF NOME
vs.
COMMON COUNCIL.

C. S. Hannum presented to the Court an order in accordance with the ruling of the Court upon petition for writ of mandamus, whereupon John Rustgard presented written exceptions to the order, which were submitted."

VIII.

That on the 9th day of October, 1908, said Court made its order, a copy of which is hereunto annexed marked Exhibit "D" and made a part hereof, and writ of mandamus directing said Conrad Freeding, Phil Ernst, Thorulf Lehman, A. C. Craig and Charles F. Rice, constituting said Common Council, to set apart, apportion and pay over to the Treasurer of the Nome School Board, for school purposes for the ensuing year, the additional sum of three

thousand dollars, from the federal license moneys in the hands of the Clerk of the said court, or that might thereafter come into his hands and be by him paid over to said Common Council. That on said 9th day of October, 1908, the following entry was made by said Court upon the journal thereof:

"October 9, 1908.

#1957.

SCHOOL BOARD

vs.

COMMON COUNCIL.

The Court signed an order directing the Common Council of the Town of Nome to pay over to the Treasurer the additional sum of three thousand dollars from the federal license money received for school purposes. Order filed. John Rustgard on behalf of the Town Council, presented exceptions be settled at this time: C. S. Hannum stated to the Court that the bill had not been served upon counsel for the School Board, and thereupon the bill of exceptions was taken by the Court for consideration."

IX.

That said Common Council, feeling themselves aggrieved by said order, thereafter and on the 14th day of October, 1908, presented to said District Court of the United States an application for a writ of error in said matter, which application was accompanied by an assignment of errors as provided by law and the rules of said court, and also a cost bond with ample and sufficient sureties in the sum of two hundred and fifty ($250) dollars as provided by law

and the rules of said court, which penal sum had formerly been fixed by said Court and which is the usual penal sum in said cases; that then and there in open court said Common Council prayed the issuance of such Writ of Error, but said Court and the Honorable Alfred S. Moore, Judge thereof, then and there refused to allow such Writ of Error and refused to approve or disapprove said bond; that the said assignments of error, application for writ of error and the bond for costs on appeal were then and there duly filed in the office of the Clerk of said court, all of which appears by the affidavit of John Rustgard hereunto annexed, marked Exhibit "H" and made a part hereof. That said Common Council believe that it would be fruitless to make further application to said District Court for the allowance of such writ of error.

X.

That true and correct copies of the petition for writ of error, assignments of error and cost bond on error and appeal so presented to said Court and filed as aforesaid are hereunto annexed and made a part hereof and marked Exhibits "E," "F" and "G" respectively.

Wherefore, your petitioners petition this Honorable Court for the issuance of a writ of error to said District Court of the United States for the District of Alaska, Second Division, under and in accordance with the laws of the United States in that behalf made and provided. And also that an order be made fixing the amount of security which said petitioners may give and furnish upon said writ of error

for the suspension of all proceedings in said District Court, and that upon the giving of such security, all further proceedings in said court be stayed until the termination of said writ of error in this court.

And your petitioner will ever pray.

Dated November 11th, 1908.

JOHN RUSTGARD,
EDGAR T. ZOOK,

Attorneys for Said Common Council of the Town of Nome, Petitioners.

[Endorsed]: #1957. In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Petition of A. A. Allen, John H. Dunn, and John T. Reed, etc., for an Apportionment of Federal License Moneys, etc. Conrad Freeding et al., Plaintiffs in Error. Petition for Writ of Error to the District Court of the United States, District of Alaska, Second Division. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jan. 8, 1909. Jno. H. Dunn, Clerk. By ————, Deputy. John Rustgard, Edgar T. Zook, Atty. for Plffs. in Error, 595 Market St., S. F. McB.

In the Circuit Court of Appeals of the United States, for the Ninth Circuit.

In the Matter of the Petition of A. A. ALLAN et al., for an Apportionment of Federal License Moneys, etc.

Bond for Costs on Writ of Error.

Know All Men by These Presents: That we, the undersigned, L. B. Doe and A. B. Cooper, are held and firmly bound unto A. A. Allan, John H. Dunn and John T. Reed, constituting the School Board of the Nome School District, in the full and just sum of two hundred and fifty ($250) dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 12th day of November, 1908.

Whereas, lately at a District Court of the United States for the District of Alaska, Second Division, in a suit pending in said court between said Allan, Dunn and Reed, above named, as such School Board, and Conrad Freeding, Phil Ernst, Thorulf Lehman, A. C. Craig and Charles F. Rice, constituting the Common Council of the town of Nome, District of Alaska, an order and writ of mandate was rendered and issued against the said Freeding, Ernst, Lehman, Craig and Rice, constituting said Common Council of the Town of Nome, and the said Common Council having obtained from the above-entitled Court a writ of error to reverse the order and writ of mandate in the aforesaid suit and a citation directed to the said Allan, Dunn and Reed, constituting the said School Board, citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco,

in the State of California, on the 11th day of December, 1908.

Now the condition of the above obligation is such that if the said Common Council of the Town of Nome, District of Alaska, plaintiffs in error in said writ, shall prosecute said writ to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and effect.

L. B. DOE. [Seal]
A. B. COOPER. [Seal]

United States of America,
Northern District of California,—ss.

L. B. Doe and A. B. Cooper, being duly sworn, each for himself, deposes and says, that he is a freeholder in said district, and is worth the sum of five hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

L. B. DOE.
A. B. COOPER.

Subscribed and sworn to before me, this 12th day of November, A. D. 1908.

[Notarial Seal] FLORA HALL,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: No. 1957. United States Circuit Court of Appeals for the Ninth Circuit. Conrad Freeding et al., Plaintiffs in Error, vs. A. A. Allan et als., Defendants in Error. Bond for Costs on Writ of Error.

The form and sufficiency of the within bond is hereby approved.

WM. W. MORROW,
Circuit Judge.

Filed in the office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jan. 8, 1909. Jno. H. Dunn, Clerk. By ————, Deputy. McB.

In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of the Petition of A. A. ALLEN, JOHN H. DUNN, JOHN T. REED, Constituting the School Board of the Nome School District for an Apportionment of Federal License Moneys Collected by This Court, the Apportionment to be Paid to the School Board to be Expended by It for School Purposes in Said School District.

CONRAD FREEDING, PHIL ERNST, THORULF LEHMAN, A. C. CRAIG and CHARLES F. RICE, Constituting the Common Council of the Town of Nome, District of Alaska,

Plaintiffs in Error,

vs.

A. A. ALLEN, JOHN H. DUNN and JOHN T. REED, Constituting the School Board of the Nome School District,

Defendants in Error.

Order [of U. S. Circuit Court of Appeals] Allowing Writ of Error.

Now, on the 12th day of November, 1908, it is ordered that a writ of error be allowed as prayed for in the petition for writ of error heretofore filed by the plaintiffs in error above named; and the amount of the bond for costs on this writ of error is fixed at $250.00.

Dated November 12th, 1908.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: #1957. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Petition of A. A. Allen, John H. Dunn, etc. Conrad Freeding et als., Defendants in Error, vs. A. A. Allen et als., Plaintiffs in Error. Order Allowing Writ of Error. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jan. 8, 1909. Jno. H. Dunn, Clerk. By ——————, Deputy. McB.

[Writ of Error—Copy.]

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the District of Alaska, Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in

the said District Court, before you, or some of you, between Conrad Freeding, Phil Ernst, Thorulf Lehman, A. C. Craig and Charles F. Rice, constituting the Common Council of the Town of Nome, District of Alaska, Plaintiffs in Error, and A. A. Allen, John H. Dunn and John T. Reed, constituting the School Board of the Nome School District, defendants in error, a manifest error hath happened, to the great damage of the said Conrad Freeding, Phil Ernst, Thorulf Lehman, A. C. Craig and Charles F. Rice, constituting the Common Council of the Town of Nome, District of Alaska, as aforesaid, plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 12th

day of November, in the year of our Lord One Thousand Nine Hundred and Eight.

[Seal] F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Allowed by:

WM. W. MORROW,

Circuit Judge.

The foregoing copy of Writ of Error is hereby lodged in the office of the Clerk of United States District Court for the District of Alaska, Second Division, according to law, this 11th day of January, 1909.

JOHN RUSTGARD,

Attorney for Plaintiffs in Error.

[Endorsed]: No. 1957. In the District Court for the District of Alaska, Second Division. Conrad Freeding et al., Plaintiffs in Error, vs. A. A. Allan et al., Defendants in Error. Lodged Copy of Writ of Error. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jan. 11, 1909. Jno. H. Dunn, Clerk. By ———, Deputy. John Rustgard, Attorney for Plffs. in Error. McB.

[Affidavit of Service of Writ of Error, etc.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of the Petition of A. A. ALLEN, JOHN H. DUNN, and JOHN T. REED, Constituting the School Board of the Nome School District, for an Apportionment of Federal License Moneys Collected by this Court, the Apportionment to be Paid to the School Board, to be Expended by It for School Purposes in Said School District.

CONRAD FREEDING, PHIL ERNST, THORULF LEHMAN, A. C. CRAIG, and CHARLES F. RICE, Constituting the Common Council of the Town of Nome, District of Alaska,

Plaintiffs in Error,

vs.

A. A. ALLEN, JOHN H. DUNN, and JOHN T. REED, Constituting the School Board of the Nome School District,

Defendants in Error.

United States of America,
District of Alaska,—ss.

John Rustgard, being first duly sworn, deposes and says:

That on the 11th day of January, 1909, in the town of Nome, in the Second Judicial Division of the District of Alaska, he served upon the

defendants in error, the writ of error, the citation on writ of error, the order allowing writ of error, and the order extending time for service of writ of error and citation, in the above-entitled cause, together with the petition upon which said writ of error was granted, by delivering to and leaving with John T. Reed, Esq., of the Town of Nome, one of the said defendants in error, and Clerk of the School Board of the Nome School District of Alaska, said John T. Reed being also one of the attorneys for the said defendants in error, true and correct copies of each of the said documents above enumerated.

JOHN RUSTGARD.

Subscribed and sworn to before me this 11th day of January, 1909.

[Seal of Court.] JNO. H. DUNN,

Clerk Dist. Court in and for District of Alaska, Residing at Nome.

[Endorsed]: No. 1957. In the District Court for the District of Alaska, Second Division. Conrad Freeding et al., etc., Plaintiffs in Error, vs. A. A. Allen, et al., etc., Defendants in Error. Affidavit of Service. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jan. 11, 1909. Jno. H. Dunn, Clerk. By ———, Deputy. McB.

[Minutes of District Court—September 5, 1908.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, Special April, 1908, Term, begun and held at the Town of Nome, in said District and Division, April 6, 1908.

Saturday, September 5, 1908, at 10 A. M.

Court convened pursuant to adjournment.

Present: Hon. ALFRED S. MOORE, Judge.
John H. Dunn, Clerk.
Angus McBride, Deputy Clerk.
E. Coke Hill, Asst. U. S. Attorney.
Thos. C. Powell, U. S. Marshal.

Now, upon the convening of Court, the following proceedings were had:

1957.

In the Matter of the Petition of A. A. ALLEN, JOHN H. DUNN, and JOHN T. REED, Constituting the School Board of the Nome School District, Alaska, for an Apportionment of the Federal License Moneys Collected by this Court, the Apportionment to be Paid to the School Board to be Expended by It for School Purposes, in Said School District.

John T. Reed presented the petition on behalf of the School Board and was granted an order apportioning fifty per cent of the federal license moneys collected and to be collected until the amount of twenty thousand five hundred dollars shall have

been paid to said School Board for school purposes during the ensuing school year.

Order filed.

[Minutes of District Court—September 8, 1908.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, Special April, 1908, Term, begun and held at the Town of Nome, in said District and Division, April 6, 1908.

Thursday, September 8, 1908, at 10 A. M.

Court convened pursuant to adjournment.

Present: Hon. ALFRED S. MOORE, Judge.
John H. Dunn, Clerk.
Angus McBride, Deputy Clerk.
E. Coke Hill, Asst. U. S. Attorney.
Thos. C. Powell, U. S. Marshal.

Now, upon the convening of Court, the following proceedings were had:

1957.

In the Matter of the Petition of the School Board of Nome for an Apportionment of License Moneys.

John T. Reed moved the Court to strike from the files motion to set aside and vacate order of Sept. 5, 1908. The matter was taken under advisement by the Court.

[Minutes of District Court—September 10, 1908.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, Special April, 1908, Term, begun and held at the Town of Nome, in said District and Division, April 6, 1908.

Thursday, September 10, 1908, at 10 A. M.

Court convened.

Present: Hon. ALFRED S. MOORE, Judge.
John H. Dunn, Clerk.
Angus McBride, Deputy Clerk.
E. Coke Hill, Asst. U. S. Attorney.
Thos. C. Powell, U. S. Marshal.

Now, upon the convening of Court, the following proceedings were had:

1957.

In the Matter of the Petition of the School Board for Nome School District for Apportionment of Federal License Moneys, etc.

On motion of John T. Reed the name of C. S. Hannum was ordered entered as counsel for the School Board.

The Court rendered a decision vacating and setting aside the order of apportionment heretofore made on September 5th and granting an order to show cause why the petition for apportionment should not be granted, said order being returnable on Saturday next at 10 A. M., counsel being directed to prepare an order for the signature of the Court.

2 P. M.

1957.

In the Matter of the Petition of the School Board of Nome School District for Apportionment of Federal License Moneys, etc.

C. S. Hannum, appearing on behalf of the School Board, presented an order vacating and setting aside order of apportionment, and was granted an order to show cause why the petition for apportionment of license moneys should not be granted, said order being returnable September 12, 1908, at 10 A. M.

Order filed.

[Minutes of District Court—September 12, 1908.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, Special April, 1908, Term, begun and held at the Town of Nome, in said District and Division, April 6, 1908.

Saturday, September 12, 1908, at 10 A. M.

Court convened pursuant to adjournment.

Present: Hon. ALFRED S. MOORE, Judge.
John H. Dunn, Clerk.
Angus McBride, Deputy Clerk.
E. Coke Hill, Asst. U. S. Attorney.
Thos. C. Powell, U. S. Marshal.

Now, upon the convening of Court, the following proceedings were had:

1957.

In the Matter of the Petition of the School Board of Nome School District for Apportionment of License Moneys.

This being the time set for the hearing on order to show cause, John Rustgard, appearing on behalf of the Common Council of the Town of Nome, was granted until Monday next to file answer, and the hearing was continued until Tuesday next at 8 P. M.

[Minutes of District Court—September 15, 1908.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, Special April, 1908, Term, begun and held at the Town of Nome, in said District and Division, April 6, 1908.

Tuesday, September 15, 1908, at 10 A. M.

Court convened pursuant to adjournment.

Present: Hon. ALFRED S. MOORE, Judge.
John H. Dunn, Clerk.
Angus McBride, Deputy Clerk.
E. Coke Hill, Asst. U. S. Attorney.
Thos. C. Powell, U. S. Marshal.

Now, upon the convening of Court, the following proceedings were had:

1957.

In the Matter of the Petition of the School Board of Nome for Apportionment of License Moneys.

This being the time set for the hearing upon the petition, C. S. Hannum appeared for the petition and John Rustgard on behalf of the Common Council. Counsel for the Common Council moved to strike out all new matter in the reply or be granted leave to file a rejoinder. The matter of the petition was argued by counsel and submitted to the Court.

[Minutes of District Court—October 5, 1908.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, Special April, 1908, Term, begun and held at the Town of Nome, in said District and Division, April 6, 1908.

Monday, October 5, 1908, at 10 A. M.

Court convened pursuant to adjournment.

Present: Hon. ALFRED S. MOORE, Judge.
John H. Dunn, Clerk.
Geo. B. Grigsby, U. S. Attorney.
Thos. C. Powell, U. S. Marshal.

Now, upon the convening of Court, the following proceedings were had:

1957.

In the Matter of the Petition of A. A. ALLEN, JOHN H. DUNN, and JOHN T. REED, Constituting the School Board of the Town of Nome, for an Apportionment of License Moneys, etc.

The Court rendered a decision stating that inasmuch as $17,500 have already been made available by the Town Council, we do not need to consider that amount, the order of the Court only referring to the remaining three thousand dollars. The Court directed that three thousand dollars be apportioned from the funds now in the hands of the Clerk of the Court or hereafter to come into his hands, and directing that it be paid over to the Town Council, whose duty it is to pay the three thousand dollars over to the School Board for the maintenance of the schools of the District, C. S. Hannum, counsel for the School Board being directed to prepare an order in accordance with the ruling of the Court.

[Minutes of District Court—October 8, 1908.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, Special April, 1908, Term, begun and held at the Town of Nome, in said District and Division, April 6, 1908.

Thursday, October 8, 1908, at 10 A. M.

Court convened pursuant to adjournment.

Present: Hon. ALFRED S. MOORE, Judge.
John H. Dunn, Clerk.
Angus McBride, Deputy Clerk.
Geo. B. Grigsby, U. S. Attorney.
Thos. C. Powell, U. S. Marshal.

Now, upon the convening of Court, the following proceedings were had:

1957.

SCHOOL BOARD OF NOME,

vs.

COMMON COUNCIL OF TOWN OF NOME.

C. S. Hannum presented to the Court an order in accordance with the ruling of the Court upon the petition for writ of mandamus; whereupon John Rustgard presented written exceptions to the order which were submitted.

[Minutes of District Court—October 9, 1908.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, Special April, 1908, Term begun and held at the Town of Nome, in said District and Division, April 6, 1908.

Friday, October 9, 1908, at 10 A. M.

Court convened pursuant to adjournment.

Present: Hon. ALFRED S. MOORE, Judge.
John H. Dunn, Clerk.
Angus McBride, Deputy Clerk.
Geo. B. Grigsby, U. S. Attorney.
Thos. C. Powell, U. S. Marshal.

Now, upon the convening of court, the following proceedings were had:

#1957.

SCHOOL BOARD OF NOME

vs.

COMMON COUNCIL OF NOME.

The Court signed an order directing the Common Council of the Town of Nome to pay over to the Treasurer of the School Board the additional sum of three thousand dollars from federal license moneys received, for school purposes. Order filed. John Rustgard, on behalf of the Town Council, presented exceptions to the granting of the order and asked that the bill of exceptions be settled at this time. C.

S. Hannum stated to the Court that the bill had not been served upon counsel for the School Board, and thereupon the bill of exceptions was taken by the Court for consideration.

[Minutes of District Court—October 10, 1908.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, Special April, 1908, Term begun and held at the Town of Nome, in said District and Division, April 6, 1908.

Saturday, October 10, 1908, at 9:30 A. M.

Court convened pursuant to adjournment.

Present: Hon. ALFRED S. MOORE, Judge.
John H. Dunn, Clerk.
Angus McBride, Deputy Clerk.
Geo. B. Grigsby, U. S. Attorney.
Thos. C. Powell, U. S. Marshal.

Now, upon the convening of court, the following proceedings were had:

#1957.

SCHOOL BOARD OF NOME

vs.

COMMON COUNCIL OF NOME.

On motion of C. S. Hannum the Court directed that counsel for the School Board be served with copy of bill of exceptions to order of apportionment.

On motion, John Rustgard was allowed to withdraw bill of exceptions from the files.

[Minutes of District Court—October 13, 1908.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, Special April, 1908, Term begun and held at the Town of Nome, in said District and Division, April 6, 1908.

Tuesday, October 13, 1908, at 10 A. M.

Court convened pursuant to adjournment.

Present: Hon. ALFRED S. MOORE, Judge.
John H. Dunn, Clerk.
Angus McBride, Deputy Clerk.
Geo. B. Grigsby, U. S. Attorney.
Thos. C. Powell, U. S. Marshal.

Now, upon the convening of court, the following proceedings were had:

#1957.

SCHOOL BOARD OF NOME

vs.

COMMON COUNCIL OF NOME.

John Rustgard moved the Court to fix bond on appeal; whereupon the Court fixed the bond at two hundred and fifty dollars.

[Minutes of District Court—October 14, 1908.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, Special April, 1908, Term begun and held at the Town of Nome, in said District and Division, April 6, 1908.

Wednesday, October 14, 1908, at 9:30 A. M.

Court convened pursuant to adjournment.

Present: Hon. ALFRED S. MOORE, Judge.
John H. Dunn, Clerk.
Angus McBride, Deputy Clerk.
Geo. B. Grigsby, U. S. Attorney.
Thos. C. Powell, U. S. Marshal.

Now, upon the convening of court, the following proceedings were had:

#1957.

SCHOOL BOARD OF NOME

vs.

COMMON COUNCIL OF NOME.

John Rustgard, appearing on behalf of the Common Council of Nome, presented petition for appeal, petition for writ of error, cost bond on appeal, and assignment of errors, and asked for an order allowing appeal. The Court stated that the bill of exceptions had not as yet been settled and the appeal would be granted in the usual way, the Court stating that counsel could file appeal papers. Appeal papers filed.

[Praecipe for Transcript of Record.]

In the United States District Court for the District of Alaska, Second Division.

No. 1957.

In the Matter of the Petition of A. A. ALLEN, JOHN H. DUNN, and JOHN T. REED, Constituting the School Board of the Nome School District, Alaska, for an Apportionment of the Federal License Moneys Collected by this Court, the Apportionment to be Paid to the School Board, to be Expended by It for School Purposes of Said School District.

To John H. Dunn, Clerk of the District Court of the Second Division of the District of Alaska.

You are hereby respectfully requested to certify and return to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, true and correct copies of all of the files and records in the above-entitled action, pursuant to Rule 14 of the said Circuit Court of Appeals.

JOHN RUSTGARD,

Attorney for the Common Council of the Town of Nome, the Plaintiffs in Error.

[Endorsed]: 1957. U. S. District Court, District of Alaska, 2d Div. In Matter of Petition of A. A. Allen et al., Constituting Nome School Board. Praecipe for Transcript. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division,

at Nome. Jan. 11, 1909. Jno. H. Dunn, Clerk. By ————, Deputy.

In the District Court for the District of Alaska, Second Division.

No. 1957.

In the Matter of the Petition of A. A. ALLAN, JOHN H. DUNN, and JOHN T. REED, Constituting the School Board of the Nome School District, Alaska, for an Apportionment of the Federal License Moneys Collected by this Court, the Apportionment to be Paid to the School Board, to be Expended by It for School Purposes in Said School District.

Clerk's Certificate [to Transcript of Record].

I, John H. Dunn, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 92, both inclusive, are a true and exact transcript of the petition of School Board for apportionment of license moneys. Order of Apportionment, Motion to Set Aside and Vacate Order of September 5, 1908, and Notice of Motion to Vacate Order, Order Vacating and Setting Aside Former Order and Order to Show Cause, Answer and Return of the Common Council of the Town of Nome to the Petition and the Court's Order to Show Cause, Reply to Answer and Return of the Common Council of the Town of Nome, Order Directing Council to Pay Over to Treasurer of School Board Additional Sum of $3,000.00, Exceptions of the Common Council to the Court's Order filed Octo-

ber 9, 1908, Petition for Appeal and Order Allowing the Same, Petition for Writ of Error, Cost Bond on Error and Appeal, Assignment of Errors, Petition for Writ of Error to the District Court of the United States for the District of Alaska, Second Division, Bond for Costs on Writ of Error, Order Allowing Writ of Error, Lodged Copy Writ of Error, Affidavit of Service, Minutes of Court Dated Sept. 5, 1908 (Hearing on Petition), Minutes of Court Dated Sept. 8, 1908 (Motion to Strike from Files Motion to Set Aside, etc.), Minutes of Court Dated Sept. 10, 1908 (Order of Sept. 5 Vacated, Order to Show Cause Granted), Minutes of Court Dated Sept. 12, 1908 (Hearing on Order to Show Cause Continued), Minutes of Court Dated Sept. 15, 1908 (Petition Argued and Submitted), Minutes of Court Dated Oct. 5, 1908 (Decision Rendered Apportioning $3,000.00 from Funds in Hands of Clerk to be Paid Over to School Board), Minutes of Court of Oct. 8, 1908 (Order upon Petition for Writ of Mandamus and Exceptions to Order), Minutes of Court of Oct. 9, 1908 (Directing Payment by Council to Treasurer of School Board of Additional Sum of $3,000.00, etc.), Minutes of Court Dated Oct. 10, 1908 (Counsel for School Board to be Served with Bill of Exceptions, etc.), Minutes of Court of Oct. 13, 1908 (Bond on Appeal Fixed), Minutes of Court Dated Oct. 14, 1908 (Petition for Appeal, etc., Presented), and Praecipe for Transcript on Writ of Error, in the Matter of the Petition of A. A. Allan, John H. Dunn, and John T. Reed, Constituting the School Board of the Nome School District, Alaska, for an Apportion-

ment of the Federal License Moneys Collected by this Court, the Apportionment to be Paid to the School Board, to be expended by It for School Purposes in said School District, No. 1957, this Court, and of the whole thereof, as appears from the files and records in my office at Nome, Alaska; and further certify that the original order extending time for service of Writ of Error and Citation, and the original Writ of Error and original Citation in the above-entitled cause are attached to this transcript.

Cost of transcript $40.20, paid by John Rustgard, Attorney for the Common Council of the Town of Nome.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 27th day of January, A. D. 1909.

[Seal] JNO. H. DUNN,

Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of the Petition of A. A. ALLEN, JOHN H. DUNN, and JOHN T. REED, Constituting the School Board of the Nome School District, for an Apportionment of the Federal License Moneys Collected by this Court, the Apportionment to be Paid to the School Board, to be Expended by It for School Purposes in Said School District.

CONRAD FREEDING, PHIL ERNST, THORULF LEHMAN, A. C. CRAIG and CHARLES F. RICE, Constituting the Common Council of the Town of Nome, District of Alaska,

Plaintiffs in Error,

vs.

A. A. ALLEN, JOHN H. DUNN, and JOHN T. REED, Constituting the School Board of the Nome School District,

Defendants in Error.

Order Extending Time for Service of Writ of Error and Citation [Original].

Good cause appearing therefor, it is hereby ordered that the time for service of the Writ of Error and Citation issued in the above-entitled matter and for the return of said Writ of Error and Citation be, and the same is hereby, extended to and including the 15th day of January, 1909.

WM. W. MORROW,
U. S. Circuit Judge.

[Endorsed]: No. 1957. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Petition of A. A. Allen, John H. Dunn, etc. Conrad Freeding et als., Defendants in Error, vs. A. A. Allen et als., Plaintiffs in Error. Order Extending Time for Service of Writ of Error and Citation. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jan. 8, 1909. Jno. H. Dunn, Clerk. By ———, Deputy.

[Writ of Error—Original.]

UNITED STATES OF AMERICA—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the District of Alaska, Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Conrad Freeding, Phil Ernst, Thorulf Lehman, A. C. Craig and Charles F. Rice, constituting the Common Council of the Town of Nome, District of Alaska, plaintiffs in error, and A. A. Allen, John H. Dunn and John T. Reed, constituting the School Board of the Nome School District, defendants in error, a manifest error hath happened, to the great damage of the said Conrad Freeding, Phil Ernst, Thorulf Lehman, A. C. Craig and Charles F. Rice, constituting the Common Council of the Town of Nome, District of Alaska, as aforesaid, plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 12th day of November, in the year of our Lord one thousand nine hundred and eight.

[Seal] F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Allowed by

WM. W. MORROW,

Circuit Judge.

[Endorsed]: No. 1957. United States Circuit Court of Appeals for the Ninth Circuit. Conrad Freeding et al., Plaintiffs in Error, vs. A. A. Allen et al., Defendants in Error. Writ of Error. Filed in the Office of the Clerk of the Dist. Court of Alaska,

Second Division, at Nome. Jan. 8, 1909. Jno. H. Dunn, Clerk. By ————, Deputy.

[Citation on Writ of Error—Original.]

UNITED STATES OF AMERICA—ss.

The President of the United States, to A. A. Allen, John H. Dunn and John T. Reed, Constituting the School Board of the Nome School District, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued out of the Clerk's Office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein Conrad Freeding, Phil Ernst Thorulf Lehman, A. C. Craig and Charles F. Rice, constituting the Common Council of the Town of Nome, District of Alaska, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. W. MORROW, United States Circuit Judge for the Ninth Judicial Circuit, this 12th day of November, A. D. 1908.

WM. W. MORROW,
United States Circuit Judge.

[Endorsed]: No. 1957. U. S. Circuit Court of Appeals for the Ninth Circuit. Conrad Freeding et

al., Plaintiffs in Error, vs. A. A. Allen et al., Defendants in Error. Citation on Writ of Error. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jan. 8, 1909. Jno. H. Dunn, Clerk. By ————, Deputy.

[Endorsed]: No. 1667. United States Circuit Court of Appeals for the Ninth Circuit. Conrad Freeding, Phil Ernst, Thorulf Lehman, A. C. Craig, and Charles F. Rice, Constituting the Common Council of the Town of Nome, District of Alaska, Plaintiffs in Error, vs. A. A. Allen, John H. Dunn, and John T. Reed, Constituting the School Board of the Nome School District, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the District of Alaska, Second Division.

Filed March 22, 1909.

F. D. MONCKTON,
Clerk.

In the United States Court of Appeals for the Ninth Circuit.

No. ——.

CONRAD FREEDING, PHIL ERNST, THORULF LEHMAN, A. G. CRAIG and CHARLES F. RICE, Constituting the Common Council of the Town of Nome, District of Alaska,

Plaintiffs in Error,

vs.

A. A. ALLEN, JOHN H. DUNN and JOHN T. REED, Constituting the School Board of the Nome School District,

Defendants in Error.

Acceptance of Service by Defendants in Error of Writ of Error and Citation on Writ of Error.

I hereby acknowledge due service upon me this day of a true copy of the Writ of Error issued in the above-entitled action on the 12th day of November, 1908, said copy being duly certified to by the Clerk of the above-entitled Court; and also do further hereby acknowledge due service upon me this day of Citation on Writ of Error issued in the above-entitled action by the above-entitled Court, said copy being certified a true copy by the Clerk of the above-entitled Court.

C. S. HANNUM,
JOHN T. REED,
Attys. for Defts. in Error.

[Endorsed]: No. 1667. United States Court of Appeals, Ninth Circuit. Conrad Freeding et al., Constituting the Common Council of the Town of Nome, District of Alaska, Plaintiffs in Error, vs. A. A. Allan et al., Constituting the School Board, etc., Defendants in Error. Acceptance of Service by Defendants in Error of Writ of Error and Citation on Writ of Error. Filed Nov. 25, 1908. F. D. Monckton, Clerk. Campbell, Metson, Drew, Oatman & Mackenzie, Attys. for Pltfs. in Error, 959 Market St., San Francisco, Cal.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 1667.

THE COMMON COUNCIL OF THE CITY OF NOME et al.,

Plaintiffs in Error.

vs.

A. A. ALLEN et al.,

Defendants in Error.

Order Extending Time for Return of Citation and Docketing Transcript.

Upon reading the annexed affidavit of Edgar T. Zook and good cause appearing therefor, it is hereby ordered that the time of the plaintiffs in error in the above-entitled matter within which to return the citation in said action and docket the transcript herein be and the same is hereby extended to, and including the 1st day of April, 1909.

Dated January 19, 1909.

MORROW,
Circuit Judge.

[Affidavit of Edgar T. Zook in Support of Application for Order Extending Time for Return of Citation and Docketing Transcript.]

In the United States Circuit Court of Appeals, for the Ninth Circuit.

THE COMMON COUNCIL OF THE CITY OF NOME et al.,

Plaintiffs in Error,

vs.

A. A. ALLEN et al.,

Defendants in Error.

State of California,
City and County of San Francisco,—ss.

Edgar T. Zook, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiffs in error in the above-entitled action; that the order allowing writ of error in said matter was issued out of this Court on the 12th day of November, 1908, and that the papers filed in this court in the matter of said application were forwarded on the 13th day of November, 1908, to the Clerk of the District Court of the United States for the District of Alaska, Second Division, at Nome, Alaska, for the purpose of making up the record on said writ of error.

That affiant has just received a communication from John Rustgard, one of the attorneys for said plaintiffs in error at Nome, Alaska, stating that the papers in said matter have just been received at Nome and requesting an extension of time to return

the citation and docket the transcript in said matter. That owing to the fact that navigation to the City of Nome is now closed for the winter and that all mail matter coming from Nome must be taken over the ice to Valdez and then to San Francisco, a trip taking at least sixty days' time, it will be impossible for the record in said cause to be returned to this Court within the next sixty days.

Wherefore, affiant requests the order of this Court extending the time for the return of the citation in said cause, and docketing the transcript therein, to, and including April 1st, 1909.

EDWARD ZOOK.

Subscribed and sworn to before me, this 19 day of January, 1909.

[Seal] MEREDITH SAWYER,

Deputy Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit.

[Endorsed]: No. 1667. In the United States Circuit Court of Appeals for the Ninth Circuit. The Common Council of the City of Nome et al., Plaintiffs in Error, vs. A. A. Allen et al., Defendants in Error. Order Extending Time for Return of Citation and Docketing Transcript and Affidavit. Filed Jan. 19, 1909. F. D. Monckton, Clerk. Campbell, Metson, Drew, Oatman & Mackenzie, Attorneys for Plaintiffs in Error, 595 Market St., Balboa Building, San Francisco, California.

At a stated term, to wit, the October term A. D. 1908, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the Courtroom, in the City and County of San Francisco, on Monday, the third day of May, in the year of our Lord one thousand nine hundred and nine. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

No. 1667.

CONRAD FREEDING et al.,

Plaintiffs in Error,

vs.

A. A. ALLEN et al.,

Defendants in Error.

Order Denying Motion to Dismiss Writ of Error and Relative to Motion for a Writ of Certiorari for Diminution of Record.

Ordered, motion of counsel for the defendants in error to dismiss the writ of error, and the motion of counsel for the plaintiffs in error for the issuance of a writ of certiorari for diminution of the record in the above-entitled cause argued by Mr. Albert H. Elliott, counsel for the defendants in error and on behalf of the motion to dismiss, and by Mr. William H. Metson, counsel for the plaintiffs in error and on behalf of the motion for a writ of certiorari, and in opposition to the motion to dismiss, and submitted to the Court for consideration and decision:

Thereupon, upon due consideration thereof and the Court being fully advised in the premises, it is ordered that the said motion to dismiss be, and hereby is, denied.

Upon the stipulation of all the parties to the above-entitled cause that the certified copy of the original affidavit of John Rustgard, now on file in the cause in this Court, may be printed and incorporated in the printed Transcript of Record in the cause with the same force and effect as if the said affidavit had been duly incorporated and certified in the original certified Transcript of Record in the cause by the clerk of the Court below, it is further ordered that the said motion for the issuance of a writ of certiorari for diminution of the record be, and hereby is, withdrawn from consideration, and that the said affidavit may be printed and incorporated in the printed record pursuant to the said stipulation of the parties.

* * * * * * * * *

Exhibit "H" to Petition for Writ of Error.

In the District Court for the District of Alaska, Second Division.

In the Matter of the Petition of A. A. ALLEN, JOHN H. DUNN and JOHN T. REED, Constituting the School Board of the Nome School District, for an Apportionment of the Federal License Money Collected by This Court, the Apportionment to be Paid to the School Board to be Expended by It for School Purposes of Said School District.

Affidavit of John Rustgard.

United States of America,
District of Alaska,—ss.

John Rustgard, being first duly sworn, deposes and says:

That he is the municipal attorney for the Town of Nome, Alaska, and has occupied such position for more than one year last past, and that he is the attorney for the Common Council of the Town of Nome in the above-entitled proceeding;

That on the 9th day of October, 1908, an order and judgment was entered and filed in the above-entitled proceeding, in words and figures as follows, to wit:

"It is hereby ordered and adjudged that the Common Council of the Town of Nome be and it is hereby ordered and directed to set apart, apportion and pay over to the Treasurer of the Nome School Board for school purposes for the ensuing school year an additional sum of $3,000.00 of the federal license money now in the hands of the clerk of this court or hereafter to come into his hands as such clerk and by him paid over to the Common Council of the Town of Nome."

That said order and judgment is final:

That on the 14th day of October, 1908, this deponent, as attorney for the Common Council of the Town of Nome, presented to the above-named Court an application for a writ of error herein and also a notice of and an application for an appeal from the said final order and judgment, which said application

was accompanied by an assignment of errors as provided by law and the rules of the Court, and also a cost bond with ample and sufficient sureties in the sum of $250.00 as provided by law and the rules of the Court, which penal sum had formerly been fixed by the Court and which is the usual penal sum in such cases;

That then and there in open court this deponent, on behalf of the Common Council of the Town of Nome, prayed the Court that the writ of error issue and that the appeal be allowed, but said Court, his Honor, Judge Alfred S. Moore, presiding, refused then and there to allow either a writ of error or an appeal and refused to either approve or disapprove the bond;

That then and there the said assignment of errors, application for writ of error, notice of and petition for the allowance of an appeal, together with the bond for costs on appeal and error, were duly filed in the office of the clerk of the above-named court;

That this deponent is satisfied that it is the intention of the Hon. Alfred S. Moore to continue in the future to refuse to allow either an appeal or a writ of error herein.

Wherefore, deponent prays that the United States Circuit Court of Appeals of the Ninth Circuit allow a writ of error to issue to the said District Court of Alaska, Second Division, or that an appeal be allowed from said order to the said Circuit Court of Appeals of the Ninth Circuit, and that the Common Council of the Town of Nome have such other and further relief in the premises as to the said United

States Circuit Court of the Ninth Circuit may seem fit and proper.

(Signed) JOHN RUSTGARD.

Subscribed and sworn to before me this 15th day of October, 1908.

[Seal] (Signed) INA S. LIEBHARDT,
Notary Public.

A true copy of the original petition this day forwarded by me to the Clerk of the District Court for the District of Alaska, Second Division.

November 12th, 1908.

[Seal] Attest: F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 1667. In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Petition of A. A. Allen, John H. Dunn and John T. Reed, etc., for an Apportionment of Federal License Moneys, etc. Conrad Freeding et al., Plaintiffs in Error. Petition for Writ of Error to the District Court of the United States, District of Alaska, Second Division. Filed May 3, 1909. F. D. Monckton, Clerk. John Rustgard & Edgar T. Zook, Attorneys for Plffs. in Error. 595 Market St., S. F.

No. 1667

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONRAD FREEDING, PHIL ERNST, THORULF LEHMAN, A. C. CRAIG and CHARLES F. RICE, Constituting the Common Council of the Town of Nome, District of Alaska, *Plaintiffs in Error,*

vs.

A. A. ALLEN, JOHN H. DUNN, and JOHN T. REED, Constituting the School Board of the Nome School District, *Defendants in Error.*

BRIEF FOR PLAINTIFFS IN ERROR.

JOHN RUSTGARD, EDGAR T. ZOOK,
Attorneys for Plaintiffs in Error.

CAMPBELL, METSON, DREW, OATMAN & MACKENZIE and E. H. RYAN,
Of Counsel.

THE JAMES H. BARRY CO.
1122-1124 MISSION ST.

FILED
MAY 14 1908

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONRAD FREEDING, PHIL ERNST, THORULF LEHMAN, A. C. CRAIG and CHARLES F. RICE, Constituting the Common Council of the Town of Nome, District of Alaska. *Plaintiffs in Error,*	
vs.	No. 1667.
A. A. ALLEN, JOHN H. DUNN, and JOHN T. REED, Constituting the School Board of the Nome School District, *Defendants in Error.*	

BRIEF FOR PLAINTIFS IN ERROR

STATEMENT OF THE CASE.

The Town of Nome is a municipal corporation organized under the laws governing the District of Alaska, and its affairs are regulated and controlled by a Town Council, known as the Common Council, consisting of seven members elected by the inhabitants of

the said town in accordance with the provisions of the Acts of Congress in that behalf made and provided.

The regulation of the school affairs of the School District of Nome is under the supervision and control of a School Board elected by the inhabitants of the District in the manner provided by the Acts of Congress, and at all of the times mentioned in this controversy the defendants in error constituted the School Board, one of said defendants in error, John H. Dunn, being at the same time treasurer of the School Board and the clerk of the District Court for the District of Alaska.

On July 20, 1908, the School Board addressed a communication to the Common Council of the Town of Nome, requesting that the said Council appropriate and set aside for the use and benefit of the schools for the ensuing year, out of the moneys available for school purposes, the sum of $19,000, and annexed an estimate to said communication of the various amounts going to make up said aggregate sum of $19,000. This estimate covered also some three hundred and fifty odd dollars of unpaid bills of the old School Board (Tr., 13, 14).

In August of the same year, this communication was supplemented by another in which a further appropriation of $1500 was asked, as the first amount requested was alleged to be inadequate to meet all the expenses, including certain repairs to the school building (Tr. 15).

Thereafter the Common Council, after a considera-

tion of the requests of the School Board by its Finance Committee and a qualified recommendation thereof, approved the same to the extent that $17,500 be made available for school purposes, the intention being that the said amount be set aside and transferred to the treasurer of the School Board as soon as the finances of the city would permit; but the Council refused to approve the requisition for the remaining three thousand dollars (Tr., 16).

The action of the Common Council in this regard was not satisfactory to the School Board, which proceeded to file with the Clerk of the District Court an *ex parte* petition addressed to the Judge of said Court, setting up the foregoing facts and that as the Common Council had refused to appropriate the full sum of $20,500 asked for by it, that the Court should apportion to the School Board such a percentage of the Federal license moneys collected by the Court, as it should deem fair and reasonable, and direct the Clerk to pay the same to the Treasurer of the Town of Nome to be forthwith paid to the said School Board; and that in the estimation of the School Board fifty percentum of the said license moneys would be a fair and reasonable percentage to be paid to the said School Board (Tr., 1, 17).

Thereafter, on the same day, and without any notice whatever to the Town of Nome or to the Common Council thereof, Judge Moore made an order adjudging that fifty per centum of the Federal license moneys

collected and to be collected by the District Court was a fair and reasonable percentage to be paid to the School Board until they had received the sum of $20,-500, and directed that upon the Clerk of the District Court (John H. Dunn) paying over the Federal license moneys to the Town Treasurer, that it should be the duty of the latter, and he was thereupon ordered to forthwith from time to time pay fifty per centum thereof to John H. Dunn, Treasurer of the School Board, until the sum of $20,500 had been paid to the said Treasurer of the School Board (Tr., 18, 20).

Upon these facts coming to the knowledge of the Common Council of the Town of Nome, the said Common Council on the 8th day of September, 1908, served and filed a notice of motion to vacate said *ex parte* order, upon the ground that the District Court had no jurisdiction over the Town of Nome, the party entitled under the law to said moneys referred to in said order, nor over the Treasurer of the town as neither had been summoned to appear in court, nor given any opportunity to be heard, and furthermore that the Court had no jurisdiction over the subject of the action or proceeding (Tr., 21, 25).

This notice of motion was set for the 12th day of September, but on the 10th day of September, the District Court made an order that upon further consideration of the matter, it vacated and set aside the order of September 5th, and it appearing to the Court that the School Board was entitled to have an order citing

the members of the School Board to appear and show cause why the petition of the School Board should not be granted, the Common Council was thereupon ordered to appear on the 12th day of September and "show cause, if any there be, why the sum of $20,500 "should not be apportioned to the School Board *out of "the Federal license moneys collected and to be col- "lected by this Court,"* etc., and directing that a copy of said order be served upon the members of the Common Council (Tr., 25, 30).

Thereupon the Common Council filed an answer to the petition of the School Board and the said Order to show cause setting up that the District Court had no jurisdiction over the subject-matter of the proceeding, it being within the discretion of the Common Council to determine what funds were available for school purposes; that the Town of Nome was a necessary party to the litigation if the Court had jurisdiction in the matter at all; that the petitioners had not the capacity to sue; and that the petition did not state facts sufficient to constitute a cause of action against the town of Nome or its officers.

Said answer further set up that the Town of Nome was a municipal corporation existing under and by virtue of the provisions of the Act approved April 28, 1904, entitled "An Act to Amend and Codify the Laws "Relating to Municipal Corporations in the District "of Alaska," and the acts amendatory thereof, and was

acting under and exercising the duties and functions created by said Acts.

That under and pursuant to such Acts, it was the duty and privilege of the Common Council to establish one or more school districts, and to provide the same with suitable school houses and to provide the necessary funds for the maintenance of the schools, and that the amount of money available for school purposes during the ensuing year was dependent largely upon the financial condition of the town and that it could not be determined how large a percentage of the money available for school purposes would be needed for constructing, equipping, and renovating school houses and in the performance of other kindred duties imposed upon the Common Council.

It was further therein alleged that since the creation of the Nome School District, the treasurer thereof had paid out unlawfully in the form of salaries to the members of said School Board, some three or four thousand dollars of the school funds in the hands of such treasurer belonging to the School District; that this sum was misappropriated by one of the present members and various of the former members of the School Board; that this sum of money was due and owing to the School Board, and that it was the duty of the petitioning members of the School Board to institute legal proceedings against the former treasurer of the School District and his bondsmen to recover this amount, but they have declined to do so.

The answer further alleges that the item of $250 for "salary due Principal Grim" and the item of $358.48 "unpaid bills of old School Board" were bills incurred during the preceding school year, for the payment of which the Common Council had provided ample funds which were placed in the hands of the treasurer of the School District, and that more than sufficient to pay such items was illegally appropriated to their own personal uses by the members of said School Board, one of them being a member of the present board.

That theretofore, on the 16th of June, 1908, the School Board had filed a petition in the District Court for an order requiring the Common Council of the Town of Nome to turn over to the treasurer of the School Board sufficient funds to pay the said items of $250 and $358.48, but the petition was denied and refused by the District Court.

The answer sets up further that the Common Council has at no time refused to provide the necessary funds for the maintenance of proper schools in the Nome School District, and had appropriated on the preceding 7th day of September, $3000, for school purposes and ordered the same paid over to the treasurer of the School District.

It is further alleged in said answer that the Town of Nome had been in debt the preceding year to the extent of $45,000 for outstanding and unpaid warrants, and at the time of the answer was still in debt to the sum of $5000; that for three months prior to the 8th

day of September, 1908, there had been no revenues of any consequence derived by the Town of Nome except from Federal licenses; that these license moneys had not been paid during the summer to the treasurer of the Town of Nome as fast as they had been collected by the clerk of the Court, as had been the custom theretofore, but had been withheld by said clerk (who is also the treasurer of the School Board) until the 8th of September, when he paid the town treasurer some $10,000 of such license moneys. That the reason the three thousand dollars appropriated to the School Board had not been turned over sooner was due to the fact that the School Board had not needed it at an earlier date and to the further fact of the negligence of the clerk of the District Court in turning the same over to the town treasurer. The answer finally asserts an intention to turn over in the future to the School District, all moneys the Common Council deems available for school purposes as fast as such moneys are received by the said treasurer of the Town of Nome (Tr., 31, 36). The reply of the School Board to the answer of the Common Council denied all of the jurisdictional allegations of the said answer; admitted by failure to deny the allegation that the Town of Nome was a municipal corporation organized under the Act of Congress approved April 28, 1904, entitled "An Act to Amend and " Codify the Laws Relating to Municipal Corpora- " tions in the District of Alaska," and acts amenda-

tory thereof, and that the said town is exercising the duties and functions created by said acts.

Said reply, however, denied that it was the duty and privilege of the Common Council of the Town of Nome to establish one or more school districts and to provide the same with suitable school houses, and to provide the necessary funds for the same, except as thereafter alleged in the said reply.

Said reply denies that the School Board for the Nome School District or the treasurer thereof as alleged in the answer has unlawfully paid out of the funds in the hands of such treasurer between three and four thousand dollars or any other sum or amount whatsoever in the form of salaries to members of such School Board or for any purpose whatsoever; denies that the said sum has been misappropriated or is now owing to said School District, or that it is the duty of the School District to institute legal proceedings against the former treasurer of the Nome School District to recover the said sum, or that they have declined so to do.

They further allege that the items of two hundred and fifty dollars due the principal of the school and the item of three hundred and forty-eight dollars unpaid bills, are existing indebtedness due and owing from the Nome School District and that the creditors holding such claims are entitled to be paid regardless of any malfeasance in office of the former members of the School Board or its treasurer.

Said reply further denies that the present School Board on the 16th of June, 1908, or at any other time, filed a petition in the District Court for an order requiring the Common Council of the Town of Nome to turn over to the treasurer of said School Board, sufficient funds to pay the said bills of $250 and $348 mentioned in the answer and reply, and deny that the said Court ever denied the prayer of any petition in any proceedings before him where in the present School Board of the Nome School District as constituted at the time of said reply, was a party to the proceedings.

The said reply denies all of the allegations relative to the indebtedness of the Town of Nome, or the action of the clerk of the District Court, in failing to pay over regularly the Federal license moneys to the treasurer of the Town of Nome as set forth in Paragraph Eleven of the answer of the Common Council, and denies that the Common Council of the Town of Nome has at no time refused to provide the necessary funds for the maintenance of proper schools in the Nome School District, and further denies that on Monday, the 7th day of September, 1908, the Common Council appropriated the sum of $3000 for school purposes or ordered the same to be paid to the treasurer of the Nome School District.

For a further reply to said answer and return of the Common Council, the reply alleges payments by the clerk of the District Court to the treasurer of the Town of Nome, on the 6th day of June, 1908, and the 20th

day of June, of the same year, out of the Federal license moneys, the sums of $3380 and $5325 respectively, and on the 6th day of September, 1908, the further sum of $10,120.70, making a total sum of $18,825.70.

Alleges the failure of the Common Council of the Town of Nome to set apart or appropriate any part of the said several sums so paid for the support and maintenance of the schools and the belief that the Common Council has paid out and expended all of said money for other purposes.

Further replying, it is alleged that if as stated by the Common Council, it did appropriate on the 7th day of September, 1908, the sum of three thousand dollars for school purposes, and ordered the same paid to the treasurer of the Nome School District, that at the time they so appropriated the said money, there was no funds in the hands of the town treasurer or under the control of the Common Council; alleges that they have called upon the clerk of the Town of Nome for a warrant upon the treasurer of the town for the amount of $3000, the refusal of the clerk to issue or deliver such a warrant to the treasurer of the School Board; alleges the calling upon the treasurer of the Town of Nome for the payment of such sum and the neglect of the treasurer of said town to pay the same.

It is further set up in said reply that the balance on hand in the treasury of the School Board is $63.97, and upon information and belief it is alleged that the Common Council has disposed of all the Federal license

moneys and that there are no available funds in its hands to meet the appropriation of $3000 so alleged to have been made for school purposes.

It is further alleged by petitioners that they were informed by the clerk of the District Court (who is the treasurer of the School Board) that the entire amount of Federal license moneys to be collected between the 15th day of September, 1908, and the end of the ensuing fiscal year will not exceed twenty-five thousand dollars, and that fifty per cent of said license money will be insufficient to support and maintain the public school of the Nome School District during the ensuing school year.

It is further alleged that the Common Council of the Town of Nome have no means to provide for funds sufficient to maintain and support the public school of the Nome School District, except from Federal license moneys received from the clerk of the District Court of the Second Division, taxes levied and assessed against the assessable property within the limits of the Town of Nome, and such fines as may be collected by the municipal court; it is further alleged upon information and belief, that the entire revenue of the Town of Nome will not be sufficient to meet the expenses incurred by the Common Council for municipal purposes, and that unless the District Court orders and directs that fifty per cent of the Federal license moneys to be collected by the clerk of this court and paid to the

Common Council, be paid to the treasurer of the School Board that the schools will be of necessity closed.

It is further alleged that the School Board is without funds save and except the $63.97 with which to pay the current expenses of the schools owing to the failure of the Common Council to pay to the treasurer of the School Board the three thousand dollars appropriated by it for school purposes.

Said reply alleges upon information and belief that the majority of the members of the Common Council of the Town of Nome have stated that the Nome School Board will never receive a dollar of the Federal license moneys to be collected and paid the treasurer of the Town of Nome until the Circuit Court of Appeals for the Ninth Circuit shall have by its order determined the amount of Federal license money so to be paid to the treasurer of the School Board.

Said reply further alleges that the ten thousand dollars Federal license money referred to in the answer of the Common Council was not withheld for the purpose of harassing or annoying the Common Council, nor was the same withheld in the interest of the School Board, but that the payment to the treasurer of the town was delayed by reason of the absence of the Judge from the district.

In the prayer to said reply, in addition to the relief asked for in their original petition, the School Board asks the Court to pay, in addition to the fifty per centum prayed for, a further sum of $9412.85, to be paid

to the treasurer of the School Board, said sum being one-half of the amount of Federal license moneys theretofore paid by the clerk of the Court to the town treasurer and no part of which is alleged to have been appropriated for school purposes.

Thereafter, on the 15th day of September, 1908, the hearing having been continued to that date, the matter came on to be heard before the Court, C. S. Hannum appearing as attorney for the School Board, and John Rustgard appearing as attorney for the Common Council. On behalf of the Common Council Mr. Rustgard moved to strike out all new matter in the reply of petitioners or be granted leave to file a rejoinder; on this motion the Court took no action (Tr., 88). Thereupon, after argument, and without the introduction of any evidence, oral or written, the matter was submitted upon the foregoing issues raised by the petition of the School Board, the answer and return of the Common Council and the reply of the petitioners (Tr., 49).

Thereafter, on October 9th, the Court made and filed its order in writing, finding that the sum of $20,500 is the proper amount to be apportioned for the use of the School Board for the purpose of paying the indebtedness of the School District, and for the maintenance of the schools for the ensuing school year; that the sum of three thousand dollars withheld by the Common Council in its discretion should be also made available for school purposes without regard to any liability of

former members of the Nome School Board to the Nome School District, and upon which finding the Court ordered the Common Council to set apart, apportion and pay over to the treasurer of the Nome School Board, for school purposes, the additional sum of three thousand dollars from the Federal license moneys in the hands of the clerk of the District Court or thereafter to come into his hands and by him paid over to the Common Council (Tr., 53).

To this order of the Court the Common Council by its attorney filed an exception (Tr., 53), and thereafter proceeded by writ of error to have this court review the action of the District Court of Alaska, and assigns the following errors as reasons why the said order of the District Court should be reversed, vacated and set aside.

ASSIGNMENT OF ERRORS.

Come now the Common Council of the town of Nome and file the following assignment of errors upon which they will rely in their prosecution of a writ of error from an appeal to the United States Circuit Court of Appeals of the Ninth Circuit, in the above-entitled cause:

I.

The Court erred in assuming and exercising jurisdiction over the subject of the action or proceeding, for the reason that the same is not within the jurisdiction

of the Court—the question of determining what funds are available for school purposes within the Town of Nome being a matter solely within the discretion of the Common Council of said town.

II.

The Court erred in assuming and exercising jurisdiction over the subject of the action, for the reason that the Town of Nome, as owner of the funds involved, is a party interested but is not a party to the proceeding.

III.

The Court erred in not dismissing the proceeding, for the reason that the petition does not state facts constituting a cause of action, or any facts entitling petitioners to any relief whatever.

IV.

The Court erred in not dismissing the proceeding, for the reason that the petitioners are not parties interested, and have no capacities to sue, the Nome School District being a corporation and the party directly interested.

V.

The Court erred in not dismissing the proceeding, for the reason that it affirmatively appears from the answer that more than the sum of three thousand dol-

lars is due and owing the Nome School District from members of the Nome School Board, and that said sum is secured by presumably valid bonds to, and in favor of, the Nome School District.

VI.

The Court erred in directing the Council to cause any money to be paid to the treasurer of the Nome School District, for the reason that it could not be determined by the Court how much of the available funds would or will have to be used by Common Council for the purpose of providing or equipping schoolhouses and other purposes, as required by Sub-section XII of Section IV of the Act of April 28, 1904.

VII.

The Court erred in making and filing the following finding of fact embodied in said order, to wit:

> "That the sum of twenty thousand five hundred dollars is the proper amount to be apportioned for the use of the School Board for the purpose of enabling the Board to pay the indebtedness against the School District, and for the due maintenance of the Nome public schools for the ensuing year."

For the reason that there was no evidence whatever submitted to the Court with reference to the matter, nor do the pleadings justify such finding.

VIII.

The Court erred in making and filing the following finding embodied in said order, to wit:

> "That said sum of three thousand dollars, in addition to said sum of seventeen thousand five hundred dollars, should be made available for school purposes for the ensuing school year, without regard to any liability of former members of the Nome School Board to the Nome School District."

For the reason that no evidence was submitted to the Court in support of such finding; that the matter is within the discretion of the Common Council of the Town of Nome, and not within the jurisdiction of the Court; and for the further reason that it affirmatively appears from the answer that the School District has assets amounting to more than three thousand dollars, and that as a part of the seventeen thousand five hundred dollars is embodied the indebtedness incurred by the School Board for the last school year in excess of the money for that year appropriated for school purposes.

IX.

The Court erred in entering and making the following order, to wit:

> "It is ordered and adjudged that the Common Council of the Town of Nome be and it is hereby ordered and directed to set apart, apportion and pay

> over to the treasurer of the Nome School Board, for school purposes for the ensuing school year, the additional sum of three thousand dollars from the Federal license moneys now in the hands of the clerk of this Court or hereafter to come into his hands as such clerk, and by him paid over to the Common Council of the Town of Nome."

Because it is unsupported by the evidence, is not justified by the findings, is beyond the jurisdiction of the Court, assumes, and in effect decrees, that all money available for school purposes shall be turned over to the treasurer of the School Board, whereas, the law imposes upon the Common Council the duty of using part of such funds for building and equipping schoolhouses and the acquisition of sites for the same, and imposes upon the present Council, whose term expires on the first Tuesday in April, 1909, the duty of providing funds for the School Board for approximately two months beyond their own term, to wit, until June 1st, 1909.

X.

The Court erred in directing the Common Council to pay the indebtedness of the School Board of the Nome School District for the year ending June 1st, 1909, for the reason that it affirmatively appears by the answer that such indebtedness was beyond the amount made available for school purposes for that year, and was due to the criminal misappropriation of funds by the School Board.

ARGUMENT.

The main question involved in this controversy is a jurisdictional one, involving a construction of the Acts of Congress relative to the disposition of certain so-called Federal License moneys.

Did the District Court of Alaska have power to determine the amount of moneys which the Common Council of the Town of Nome should pay to the School Board for the maintenance of the Public School of Nome, out of the Federal License moneys either in the hands of the Common Council or to be paid to said Council by the clerk of the District Court?

In order to arrive at a proper understanding of the question, it will be necessary to present a resumé of the various acts of Congress upon the point, which we will do briefly.

Under the Act of March 3, 1899 (30 Stats. L. 1253, Chap. 429), as amended by the Act of June 6, 1900, entitled "An Act making further provision for a civil government for Alaska and for other purposes" (31 Stats. L. 321, 330, Chap. 786; Carter's Ann. Codes, Part III, Chap. 1, Sec. 29, p. 140 *et seq.*), a system of licenses taxes was provided to be assessed against certain occupations carried on in the District of Alaska for the purpose of obtaining revenue to meet some of the needs of the District. In and by said Act, the clerk of the District Court was empowered to issue the licenses designated, and all moneys received by him for

such licenses were to be "covered into the Treasury of " the United States under such rules and regulations " as the Secretary of the Treasury might prescribe."

By the later Act of June 6, 1900 (Title III, Sec. 203, 31 Stats L. 521, Chap. 786; Sec. 203, Part V, Carter's Ann. Codes), the Government being evidently desirous of specially meeting the needs of the municipal corporations concerning school funds, provided that fifty per centum of these license taxes collected within its corporate limits should be paid over by the clerk of the District Court to the treasurer of such municipal corporation for school purposes.

At this time the municipal corporations had no power to levy any taxes for school purposes, their taxing power being specially limited to the levying and collection of certain other local taxes, and in fact this Act of 1900 being the first provision made for the organization of municipal corporations within the District (Title III, Sec. 201, 31 Stats. L. 521, Chap. 786; Carter's Ann. Codes, Sec. 201, Part V, Chap. 21).

Subsequently, Congress finding that fifty per centum of the license tax moneys might be more than was necessary for the maintenance of the schools, provided by the Act of March 3, 1901 (31 Stats. L. 1438, Chap. 859; 1 Fed. Stats. Ann., p. 268), that where such fact was made to appear to the satisfaction of the District Court, that such court from time to time by its order entered with a statement of the facts upon which it is

based, might authorize the surplus to be expended for municipal purposes.

On March 2, 1903 (32 Stats. L. 944, Chap. 978; 10 Fed. Stats. Ann., 8), Congress passed a kind of omnibus bill providing that the entire proceeds of the license taxes collected within the limits of any municipal corporation should be paid over by the clerk of the District Court to the treasurer of the municipal corporation for municipal and school purposes, *in such proportions as the Court may order,* with a qualifying clause to the effect that not more than fifty per centum nor less than twenty-five per centum should be used for school purposes, the remainder to be paid to the treasurer of the corporation for the support of the municipality.

The next legislation by Congress upon the subject was the Act of April 28, 1904 (33 Stats. L. 529, Chap. 1778; 10 Fed. Stats. Ann., p. 15). This Act of 1904 is in terms designated as an "Act *to amend and codify* " the laws relating to *municipal corporations* in the " District of Alaska."

Section 7 of said Act is substantially the same as Section 4 of the Act of 1903, with this vital difference—the words *"in such proportions as the Court may order"* are eliminated therefrom, as also the clause relative to the fact that no more than fifty per centum nor less than twenty-five per centum is to be used for school purposes. In other words, the clerk of the District Court is to turn over these license moneys unqualifiedly

to the treasurer of the town, *to be used for school and municipal purposes.*

In addition to the foregoing, in providing what the powers of common councils of incorporated towns shall be, Congress for the first time in legislating for Alaska, provided that such town councils should have power to *"assess, levy and collect"* not alone a tax for municipal purposes, but a general tax for *school* and municipal purposes, upon all real and personal property.

Section 4, Subdivision 9.

And in Subdivision 12 of Section 4, Congress further gave to the town councils the power to establish "one " or more school districts, to provide the same with " suitable schoolhouses and *to provide the necessary* " *funds for the maintenance of schools. . . .*"

The final legislation of Congress upon the subject, so far as this controversy is concerned, is found in the Act of January 27, 1905 (Chap. 277, 33 Stats. L. 616; Fed. Stats. Ann., Vol. 10, p. 20). This Act was entitled "An Act to provide for the construction and main- " tenance of roads, *the establishment and maintenance* " *of schools, etc."*

Under Section 4 of said Act, in addition to the duty imposed upon common councils to establish school districts in their respective towns, there was also imposed the duty to establish schoolhouses and to maintain public schools therein *and to provide the necessary funds for the schools.*

This was the existing condition of the law when the proceedings shown by the record herein took place, and from the action of the District Court upon such proceedings, the writ of error was sued out. We therefore submit:

I.

That the District Court of Alaska was entirely without jurisdiction in the matter, in that the question of determining what funds were available for school purposes within the Town of Nome, was a matter entirely within the discretion of the Common Council of said town.

See

Assignments of Error, 1 to 12, pages 62, 66.

A. The position taken by the defendants in error in the court below, and sustained by Judge Moore, was that notwithstanding the passage of the Acts of 1904 and 1905, the provisions of the Act of 1903 relative to the power of the District Court to apportion the Federal License funds was still in force, and that the duty was imposed upon such court to determine the amount of money which should be devoted by the Common Council to school purposes. But even conceding, for the purposes of the argument, that the Act of 1903 was in force in this respect, that provision relative to the apportionment by the Court does not give such Court any authority to direct the *Common Council* how it shall expend the money of the City of Nome.

The Act of 1903, in so far as it might be admitted to apply to the question in issue, reads as follows:

> "All license moneys . . . shall be paid by the said clerk to the *treasurer* of such corporation, to be used for municipal and school purposes *in such proportions as the Court may order.*" Sec. 4.

This provision only gives the Court the power to order its own clerk to pay a certain percentage of the license moneys to the City Treasurer for school purposes. It was the duty of the Court thereunder to decide before the money left the hands of the clerk, how much should be paid to the *treasurer* for school and how much for municipal purposes.

Under that Act the Court deals only with its own clerk, and not with the City Council.

Furthermore, under the Act the school money was to be paid to the *treasurer* of the town for a specific and express object, and it was not within the power or authority of the Common Council to touch these moneys or to dispose of them.

In the case at bar, the order made reads as follows:

> "It is ordered and adjudged that the Common Council of the Town of Nome be and it is hereby ordered and directed to set apart, apportion and pay over to the Treasurer of the Nome School Board, for school purposes for the ensuing school year, the additional sum of three thousand dollars from the Federal license moneys now in the hands of the clerk of this Court, or hereinafter to come

into his hands as such clerk and by him paid over to the Common Council of the Town of Nome."

It is evident that if the Court could be deemed to have been acting under the authority of the Act of 1903, it would under such Act have had no power to make such an order as the foregoing, for under such Act the amount of the license moneys to be used for a specific object, i. e., school purposes, is to be paid to the *Treasurer* of the town corporation; and any mandate issuable in the matter should have been addressed to the *Town Treasurer* and not to the Common Council, which Council could logically have no authority to act, upon the only construction to be placed upon the action of the Court below,—that it deemed the act of 1903 in force and was proceeding thereunder.

Under such Act the Court apportions the moneys; the Clerk is to pay such moneys in the *portions directed* to the *Town Treasurer,* one portion for school purposes to go to the School Board as it needed it, the other portion to the use of the municipality. The Common Council had no right granted or duty devolving upon it relative to the school portion. The municipal portion *only* concerned it.

It is therefore clear that the proceeding was an improper one, as directed to the *Common Council* even conceding, as we have done argumentatively, that the District Court had the power to act in relation to the distribution of these license moneys.

B. But the position that we take in this matter is flatly, that the schools of Nome are being operated under the Act of January 27, 1905, and that the Act of 1903 in so far as least as it concerned the municipal corporations, and the disposition and control of the Federal license moneys was repealed by the Act of 1904, the latter Act controlling the government of municipal corporations in the District of Alaska.

> "All Acts and parts of Acts inconsistent with this Act are to the extent of such inconsistency, hereby repealed; and the provisions of this Act shall apply to and govern all municipal corporations heretofore created in the District of Alaska."

Sec. 8, Act of 1904.

Section 7 of the Act of 1904 is as we have hereinbefore shown in the synopsis of the various Acts of Congress, a practical re-enactment of Section 4 of the Act of 1903, with a complete elimination of the authority given by the prior Act of 1903 to the District Court, to apportion the Federal license moneys; and also a complete elimination of any qualification or restriction upon the authority of the Town Treasurer to receive the whole of said moneys for the general benefit of both the municipality and the schools.

> "All license moneys . . . shall by said Clerk be paid over to the Treasurer of such Town, *to be used for school and municipal purposes within the town.*"

Section 7, Act 1904.

There is no provision for an apportionment to be made by the Court as between the school and the municipality; no limitation as to the percentum that must be paid the schools, i. e., not less than twenty-five nor more than fifty per cent of such moneys.

See Act of 1903, Sec. 4.

Can it be said that the omission of these provisions in the Act of 1904 was either an accident or an oversight upon the part of Congress? Or would it not seem self-evident that it was the design and intent of Congress in providing for the payment of these moneys over generally for school and municipal purposes, without any reservation or qualification, to place the power in the hands of the municipality through its governing board,—the Common Council—to decide in what way these moneys should be expended?

It should be borne in mind, in this connection, that when the original Act concerning these license taxes was passed in 1899, there were no municipal corporations in the District of Alaska, and all funds arising from such licenses went into the hands of the Clerk of the District Court to be applied to the incidental expenses of the District Court, said Clerk accounting for the same under the direction of the Secretary of the Treasury (Section 4, Act of May 17, 1884, Vol. 1, Supp. R. S. U. S., p. 431, Act of March 3, 1899, Sec. 460, Vol. 1, Supp. R. S. U. S., 1091).

At this time (1899) the District of Alaska had no internal revenue to speak of. It was dependent upon the *largesse* of Congress in drawing upon the independent funds of the nation for its support. It was doubtless with the object of helping the District to assist in its own support, and in that respect to render it more independent in its relation to the general government that these license taxes were imposed as the first step towards that end.

This is apparent from the report of the chairman of the Committee on Territories, in response to inquiries from Senators, where he says:

> "The Committee on Territories have thoroughly investigated the condition of affairs in Alaska, and have prepared certain licenses which in their judgment will create a revenue sufficient to defray all of the expenses of the government of the territory of Alaska. . . . *Not one dollar of taxes is raised on any kind of property there.* It is therefore necessary to raise revenue of some kind, and in the judgment of the Committee on Territories, after consultation with prominent citizens of the Territory of Alaska, including the Governor and general other officers, this code or list of licenses was prepared by the Committee. It was prepared largely upon their suggestions and upon the information of the Committee derived from conversing with them." Vol. 32, Congressional Record, Part III, p. 2235.

Binns vs. *United States,* 194 U. S., 486; 24 Sup. Ct. Rep., 819.

It was not until the passage of the Act of June 6, 1900, making provision for a civil government for Alaska, and embodying the license tax laws, that any provision was made as to the special disposition of these moneys. By that Act it was provided that they were generally to be "covered into the Treasury of the United States" but that fifty per centum collected within the limits of any municipal corporation thereof should be paid over by the Clerk to the Treasurer of such corporation for school purposes to be expended under the direction of the Council; and in and by the same Act provision was for the first time made for the organization and incorporation of municipalities.

This was the second step in the process of the gradual release of the control of internal affairs of the territory of Alaska from the leading strings of the Federal Government; the third step being exercised three years later, when municipal corporations having been organized under the power granted by Congress in 1900, it was evidently deemed wise in the estimation of that body to expressly apply these license funds not alone to *school* purposes but also to the needs of the municipalities. The time not yet being deemed ripe for the complete emancipation of the municipalities from the Federal control, the District Court was named as a sort of board of equalization to say what proportion of the funds should go to the School Boards authorized under the Act of June 6, 1900, and what proportion to the municipalities for their other municipal needs.

But one year's trial of this procedure resulted in an amendment of the law by which a complete detachment from the District Court of the affairs of the municipalities was effected. In other words, by a gradual process of evolution, Congress finally gave to the municipalities the power of deciding what were the particular financial needs of each branch of the municipal government, after also providing for a system of taxation for both school and municipal purposes. And by the passage of Section 7 of the Act of 1904, completely removed the power from the District Court of deciding what amount should be paid by the Treasurer of the incorporated towns to the schools and what amount should be reserved for other municipal purposes. Said Act provided:

> "*All* license moneys shall be by said Clerk paid over to the *Treasurer* of such town to *be used for school and municipal purposes.*"

That it was the intent of Congress to make the municipal authorities responsible for the schools and their support, and to relieve the Federal authorities of all responsibility in the matter (other than the collection of the fees upon the issuance of the licenses by the Clerk of the District Court), is, we think, not alone clear from the foregoing but it is further apparent from the other provisions of said Act of 1904.

As we have hereinbefore shown to the Court, up to 1904, the Common Council had no authority to levy

any tax for school purposes. But Subdivision 9 of section 4 of said Act gives the Council authority to "assess, levy and collect a general tax for *school* and municipal purposes."

Why was this new power given to the Common Council at this special time, if it was still the intention of the Court to leave the amount of money to be used by the schools to the judgment of the District Court?

And further, by Subdivision 12 of Section 4 of said Act of 1904, the Common Council was further authorized:

> "To establish *one* or *more* school districts, to provide the same with suitable school houses *and to provide the necessary funds for the maintenance of the schools.*"

This was an additional power conferred upon the Council and for the evident purpose of relieving the District Court of Alaska of the duty of interfering with municipal affairs, and to concentrate the management of such affairs in the hands of the municipality.

Suppose the Common Council created several school districts in the town, is the District Court to decide how much of the funds is to be devoted to each district?

Under both the law of 1904, and the Act of 1905 (Section 4) the Council may create "one or more" school districts. It is also very evident from the Act of 1905 that each District so created must have a separate set of school officers.

Section 4 of said Act provides that the School Board shall be elected by the "residents of the School District," not residents of the town or of the school district*s*, but residents of the school district; and that the town treasurer shall give a bond *"to the school district,"* not to the district*s*. All of which shows that each district is a corporation by itself.

Now under the law of 1903, all that the Court could do is to determine how much of the license money shall be turned over to the town *treasurer* for school purposes. Who then is to determine how much the treasurer is to turn over to *each* school district within the town? Under the law of 1903, the Council has absolutely no jurisdiction over this particular fund. The treasurer has clearly no authority to decide in the matter. If the two or more school boards in the town do not agree, who shall settle their dispute?

Surely the law of 1903 is inconsistent with and repugnant to the subsequent acts and is therefore repealed both expressly and by implication by those acts.

> "The rule seems to go further and to work an implied repeal in all cases in which a general revision of the old law is made by the Legislature with an intent to substitute the new legislation for the old. Upon this principle, it has been applied to *codifications;* whilst on the other hand the appealing effect of revising statutes and codifications has been frequently limited to such matters embraced in the old law as were omitted in the new

. . . But the general rule seems to be that statutes and parts of statutes omitted from a revision are to be considered as annulled and are not to be revised by construction."

Endlich on the Interpretation of Statutes, Sec. 203, pp. 271-2;
Brocken vs. *Smith,* 39 N. J. Eq., 169;
Ellis vs. *Paige,* 1 Pick. (Mass.), 43-5;
Rutland vs. *Mendon*, Id., 54.

The very object of the Act of 1904 was as expressed in its title "to amend and codify the laws relating to municipal corporations in the District of Alaska." The main feature of the amending part is the increase of the power of the town. By this Act as is here shown the town is authorized to "levy a tax for school purposes" and the Council is directed to provide funds for the maintenance of the schools.

At the same time, as has been shown this Act reiterates Section 4 of the law of 1903 but excludes therefrom the particular clause—"in such proportions as the Court may order"—which authorizes the Court to act by directing the Clerk how much of the license moneys to pay to the Town for school purposes; and in lieu thereof directs the Clerk to pay all the license moneys to the Treasurer of the Town without the Court making any pro rata apportionment.

Throughout the Act is a clear intention indicated on the part of Congress to effect a change in the adminis-

tration of municipal affairs, and to place full power in the Common Council to dispose of all these license moneys in connection with the other funds available to it for both school and municipal purposes, in such manner as in its discretion it deemed best for the interests of all the various branches of the municipal government.

The statute not only provides that the Council shall have authority to "provide the necessary funds" for the schools, but from the very nature of its position the Common Council is the only authority which can determine what funds are and are not available for school purposes.

What is and what is not a proper school is a matter depending entirely on individual judgment and ideas, *but how much money shall be devoted to the schools depends upon the finances of the town and the needs of the other municipal departments.*

The schools are only one of the various municipal departments to which the funds should be devoted. The funds at the disposal of the authorities are naturally limited. No one department, however, can be allowed to consume so much money as to unmeasurably hamper the other departments. The force of the fire and street departments might be doubled and yet leave much to be desired, but this would necessarily be to the disadvantage of the schools; the efficiency of the schools might be quadrupled, by the expenditure of large sums of money but this would work a hardship to the fire, the police and the street departments by reason of the

lack of funds. It would be a proposition of "robbing Peter to pay Paul." Therefore to maintain a fair equilibrium between these municipal departments, and not to allow one to encroach upon the rights of the others, is the duty devolving upon the Common Council.

Is it therefore for the District Court to say how much money is to be devoted to one of such departments, the school branch—and how much shall be "lumped" for the other departments? The question answers itself, in the light of the later legislation of Congress giving to the Common Council the power to levy a general tax for both school and other municipal needs and imposing upon it the duty of "providing the necessary funds for the maintenance of schools" (Section 4, Subdivision 12, Act of 1904; Section 4 Act of January 27, 1905).

If the Common Council is to provide for necessary funds for the maintenance of the schools, how can it still be maintained that the District Court is to decide what amount of the *license* funds is necessary for the schools?

If the District Court is to apportion these license funds, upon what basis is the apportionment to be made unless upon the needs of the schools? And *non constat* the return on the levy by the Common Council of the general tax for school and municipal purposes might be more than sufficient for such needs. If it could be held that the Act of 1903 in respect to these license funds is in force, we would have an apportionment

based upon the needs of the schools paid over to the Treasurer of the Common Council, in two segregated amounts, one for school purposes and one for municipal needs. Then he would have a fund arising from the general tax for schools and municipal purposes which is to be disposed of in the discretion of the Common Council. But if the Court has already decided by the apportionment of the license taxes, what is necessary for the schools and such fund as determined by the Court is in the hands of the Treasurer for that specific purpose, how then is the Common Council to provide the necessary funds for the maintenance of the schools in accordance with the provisions imposing such duty upon it? They would already be provided for in the discretion of the Circuit Court.

We contend that when Congress expressly conferred upon the Common Council the general power to provide for the maintenance of the schools, there was included in such power all such implied powers as might be necessary to carry into effect or make available the general powers thus granted, including the discretion to determine the amount of the needs.

Zalesky vs. *Cedar Rapids,* 92 N. W., 657, 9.

And while such power would not imply the right to levy a special tax, as was said in the case of *United States* vs. *City of Burlington,* 24 Fed. Cases, 1302, it would imply that "out of the various resources of the " city, its general annual tax, its wharfage, its licenses

"or its power to borrow money, some means would be "provided by the city authorities for that purpose."

What are the general resources of the Town of Nome? The returns arising from the levy of a general school and municipal tax and the license taxes which are directed to be turned over to the Treasurer of the Town of Nome for both school and municipal purposes.

It is clear that Congress could never have intended such a conflict of authority but designed by the amendment of 1904 to place all funds, arising through the general tax or the Federal license tax in the hands of the Common Council to be disposed of in its discretion so as to best meet the needs of the municipality and to remove from the District Court the power theretofore granted it. The intent we think is clear and is also borne out by the provisions of the Act of 1905, and should control in the construction of these acts, even were the language not such as to plainly express the intent. Such a construction must be given to the Acts of Congress as will carry into effect their obvious intent.

> *Hamner et al.* vs. *Waskey et al.*, C. C. A., 9th Circuit, May 3, 1909.

Says the Court of Chancery of New Jersey:

> "The intention of the legislature controls the courts, not only in the construction of an act, but also in determining whether a former law is repealed or not. Whatever that body manifestly intended is to be received by the courts as having been

done by it, provided it has in some manner, no matter how awkwardly indicated or expressed that intention.

"If, therefore, it be clearly apparent that it intended to abrogate a former law, no matter whether that intimation be expressly stated or not, it must be carried out. This is in no manner adverse to the rule always acted on, that the later statute does not by implication repeal a former touching the same subject matter, where they can both be supported. If there be a repugnancy between them so that both cannot be enforced, it is presumed the legislature intended that the last act should prevail, that being the last expression of its will; and that by passing an act altogether repugnant to one already existing, it intended to repeal the former. So it is the intention of the legislature which controls in such cases, the repugnancy being the means only whereby it is ascertained. But the intention ascertained by any other means is equally cogent in controlling the courts. True, appeals by implication are not favored; and if it be not perfectly manifest, either by irreconcilable repugnancy, or by some other means equally indicating the legislative intention to abrogate a former law, both must be maintained. The intention, if perfectly clear, however, must control, however it may be expressed or manifested. It is upon this principle, evidently, that it is held that a statute revising the whole subject matter of a former law repeals it."

Thorpe vs. *Schooling,* 7 Nev., 17.

"Where a statute is evidently intended to revise

the whole subject treated in a former statute and to be substituted therefor, it repeals such former statute."

Sedgwick on Construction of Statutes and Constitutional Law, page 365.

"Where one act is framed from another, some parts taken and others omitted, the later act operates without any repealing clause as a repeal of the first."

Sutherland on Stat. Const., p. 209.

"Sections omitted in a revision are not revived but annulled."

Pingree vs. *Snell,* 42 Me., 53.

"It is a well settled rule, that when any statute is revised, or one act framed from another, *some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled.* To hold otherwise would be to impute to the legislature gross carelessness or ignorance; which is altogether inadmissible. We are not therefore at liberty to suppose, that the proviso or exception in the provincial statute was omitted by mistake."

Ellis vs. *Paige,* 1 Pick. (Mass), 45.

As was said by the Supreme Court of Chancery of New Jersey in *Bracken* vs. *Smith,* 39 N. J. Eq., 171,

relating to a similar condition, and referring to the later act revising a former act on the same subject:

> "By the passage of that act, the legislature intended, as I think, to gather up and incorporate in a single act all the prior legislation that they thought worth preserving, and to sweep the rest away. The legal rule which must control the decision of the case is perfectly well settled. Where there are two acts on the same subject, the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions, the later act, without any repealing clause, operates, to the extent of the repugnancy, as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the later act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act. *United States* vs. *Tynen,* 11 Wall., 88. Mr. Justice Van Syckel, in *Roche* vs. *Jersey City,* 11 Vr., 257, 259, said: 'This rule does not rest strictly upon the ground of repeal by implication, *but upon the principle that when the legislature makes a revision of a particular statute, and frames a new statute upon the subject-matter, and from the frame-work of the act it is apparent that the legislature designed a complete scheme for the matter, it is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is discarded.* It is decisive evidence of an intention to prescribe the provisions mentioned in the later act as the only ones on that subject which shall be obligatory.' "

"It is sound law, we think, and no authorities can be found that will controvert it, that a subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, must operate to repeal the former, although it contains no words to that effect."

Bentley vs. *Fraley,* 46 N. W., 509.

But the case at bar is not one of a repeal by implication, but an express repeal is embodied in Section 8 of the Act of 1904, which provides that "all acts and parts of acts inconsistent" therewith shall be repealed.

It can not surely be contended that the omission of the only words giving power to the District Court to act is consistent with the continued existence of that power.

The position taken by the Court below was in accordance with an earlier decision rendered by it in the case of *The School Board* vs. *The Common Council,* 2 Alaska, 351, wherein it was held that because the Act of 1904 does not state in terms who shall have the power to apportion the license moneys,—the School Board or the Common Council—as between the School Board and the Common Council, that therefore it must be presumed that Congress intended that the power should still remain where it had been placed by the Act of 1903, in the District Court. In other words reviving the part omitted by construction. And this in the face of the express omission not alone of the words "in the proportions that the Court may order," but of the fur-

ther proviso that not more than fifty per centum nor less than twenty-five per centum should go for school purposes. It is the province of courts to interpret legislation, not to supply omissions.

If the power to apportion at all can still be said to exist in the District Court in the absence of the first clause, is that Court still limited to the proviso as to the percentage, in the absence of those qualifying words, or would it have power to apportion the funds as between the two boards in its discretion, and give if it chose, more than fifty per cent to the School Board or less than twenty-five per cent to the said board? If one proposition is logical, the other is equally so.

The case of *Ripley* vs. *Gifford,* 11 Iowa, 367, is in point. There the Legislature omitted in revising the Code to provide a "fee bill" to guide in the charging of fees by municipal officers. It was contended that because of such omission, the old fee bill was in force and should be followed but in denying such contention the Supreme Court of Iowa uses the following pertinent language:

> "The rule that the real intention of the Legislature, when ascertained, will prevail over the literal sense, has no application. The Legislative act unmistakably fails to provide for the compensation of these officers. There is no obscurity; nothing left in doubt. There is no language that we are called upon to construe. It is simply a *casus omissus,* and we can not presume because the General Assembly

ought to have provided a 'fee bill,' that they would, therefore, have re-enacted the old one, any more than we can presume they would have enacted another and different one. To say that chapter 136 is still in force, would be most palpable judicial legislation. The Legislative will is frequently as clearly shown, by the omission to legislate upon a given subject, as by the use of language the most positive and explicit. It is our duty to declare the law, that of the Legislature to make it. Our province is not by interpretation and construction to supply an omission, any more than it is to declare the law otherwise than we find it, when the language used is clear, explicit and positive. The duty of Courts in this respect is too well and uniformly settled to permit a departure from it, however great the necessity or pressing the exigency.

"The consequences to result from this view, have been strongly urged by those claiming that the Legislature intended to re-enact the old law. With these consequences we have nothing to do, in a case so free from doubt and uncertainty."

In the case at bar we have a clear intention to be drawn from the Acts of 1904 and 1905 which must be considered in *pari materia* with the Act of 1903 (*Re McKenzie,* 180 U. S., 536) to take away the power theretofore residing in the District Court, as well as a literal withdrawal of that power, if the omission of the granting words can be said to mean anything. And even if it could be successfully maintained that the power to decide the amount of the license taxes neces-

sary for the purposes of the schools, nowhere appears to have been *literally* located in either the Common Council or the School Board, as is the contention of the defendants in error, that fact would not alter the existing condition, that Congress had nevertheless withdrawn all such power from the District Court relative thereto.

> "It is true that statutes in *pari materia* are to be construed together; as, if a provision in one statute receives a judicial construction, and it is inserted in another, the same construction would be given to it; *but where the clause varies it shows a different intention in the Legislature.*"
>
> *Rutland vs. Mendon,* 1 Pick. (Mass.), 155.

We therefore maintain that, as we have hereinbefore fully argued, the only construction to be placed upon this legislation is that Congress intended to concentrate all power to regulate the needs of the municipal corporation in the Common Council, its governing body, and that the District Court having no power over the license funds, had no jurisdiction to issue the writ of mandate herein and thereby attempt to dictate to the Common Council and control its discretion in relation to what it deemed was an amount sufficient, in consideration of the finances of the incorporation, to meet the demands of the schools.

II.

The Common Council acted within its discretion when it refused to allow the full amount of $20,500, asked for by the School Board as an appropriation for the ensuing school year, and the District Court had no jurisdiction to control the discretion of the Common Council in the matter after it had once exercised that discretion.

It is provided by the Code of Alaska, Sec. 553, Part IV, Ch., 56, that the writ of mandate "may be issued " to any inferior court, corporation, board, officer or " person to compel the performance of an act which " the law especially enjoins as a duty resulting from an " office, trust or station. But though the writ may re- " quire such court, corporation, board, officer or person " to exercise its or his judgment or proceed to the dis- " charge of any of its or his functions it shall not con- " trol judicial discretion. . . ."

In construing a similar statute in the Oregon laws, it was held that the intent of the law was not limited to the discretion of the judiciary, but to that of boards, the Supreme Court saying:

> "It may require the officer to proceed to the discharge of any of his functions although such discharge involves an exercise of discretion and judgment, and a choice between different modes of proceeding, yet it shall not control judicial discretion.

And it is safe to go further and say it shall not control discretion, judicial or otherwise, which the law assigns to an officer (Judges of *Oneida* vs. *People,* 18 Wend., 97). In such a case the office of the writ is to compel the officer to act. The *mode* of acting is still to be determined by him in whom the law has lodged the discretionary power."

Ball vs. *Lappius,* 3 Or., 56.

And this seems to be in conformity to the general rule.

"While the writ of *mandamus* lies in many cases to courts and judicial officers to compel them to perform certain acts, or to take action in various classes of cases, in no case will the writ issue to control the exercise of discretion vested in such Court or officers."

Vol. 13, *Ency. Pl. & Pr.,* 526, and note.

In *High on Extraordinary Remedies,* the author states the rule substantially as above and then says:

"It applies with special force to cases where the aid of *mandamus* is sought against inferior courts or judges, public officers, municipal authorities, and corporate officers generally, and in all these cases it is the determining principle in guiding the courts to a correct decision. And whenever such officers or bodies are vested with discretionary power, in the performance of any duty required at their hands, or where in reaching a given result of official

action they are necessarily obliged to use some degree of judgment and discretion, while *mandamus* will lie to set them in motion, and to compel action upon the matters in controversy, it will in *no matter* interfere with the exercise of such discretion, nor *control* or dictate the judgment or decision which shall be reached."

Section 24, Vol. 1.

See also *Jacobs* vs. *Board of Supervisors of San Francisco,* 100 Cal., 121, where the Supreme Court of California, in holding that such board acted judicially in fixing water rates and could not be compelled by *mandamus* to change its judgment, say:

"It is beyond doubt the universal rule that mandamus will not lie to control the judgment of an officer or tribunal to whom is given discretionary power—the power to examine, consider and determine. In such a case the writ can be used only to compel the exercise of discretion *but when the discretion has been exercised the writ can not be used to compel a party to abandon his own judgment and to make it conform to the judgment either of the Court or of some other person.*" (Italics ours.)

See also—

Sullivan vs. *Gage,* 145 Cal., 767.

When on the 26th day of August, 1898, the Common Council acted upon the application of the School Board and accepted the recommendation of its Finance

Committee that $17,500 be made available for school purposes, for the ensuing school year, that must be taken as an estimate of the entire amount of money which the Council considered available in the town treasury for school purposes of any kind for that period of time.

The law does not provide that the Common Council shall turn over to the School Board all moneys available for school purposes, for under Subdivision 12 of Section 4 of the Act of 1904 (under which the municipality acts), it is the duty of the Council to retain out of such funds all moneys that may be found necessary from time to time for the "construction and equipment of school houses and the acquisition of sites for the same."

It must be presumed that the Common Council had this provision in mind when it acted upon the demand of the School Board and not knowing what contingencies might arise in the way of a necessity for the construction or equipment of school houses during the ensuing year, was influenced in the exercise of its discretion in approving the claim of the School Board by that fact in making the recommendation for $17,500 only. And that this was so appears from the answer of the Common Council to the order to show cause (Paragraph 6 thereof).

Said answer further shows that the Council also had in mind the needs of the various other municipal departments which had to be considered in apportioning the limited funds at their disposal (Paragraph 6).

It further appears that in the report of their Finance Committee recommending the allowance of the requisition of the School Board, for $17,500 there was a further recommendation that the remaining three thousand dollars shall not be paid until the Board had sought to recover from the Treasurer of the old School Board or his bondsmen, by a proper action, the amount of funds which had been theretofore illegally appropriated by members of the former School Board in payment of salaries to themselves. The recommendation of the committee as a whole was approved and the decision submitted to the School Board.

It nowhere appears that the only reason for the action of the Council was that based on the action of the old School Board in appropriating such moneys illegally, as appears to have been the conclusions of the lower court. The answer of the Common Council as we have shown shows on the contrary, several other reasons entering into its judgment in acting upon the application of the School Board.

But the former School Board, of which one of the members of the present School Board was also an officer, had voted its members salaries and had appropriated such salaries from the amounts allowed by the Common Council for the maintenance of the schools.

There is no salary provided for by the Acts of Congress for the members of the School Board, and that board had no authority to vote its members salaries in

the absence of such express provision in the act creating the office. This is, we think, settled law.

Mechem on Public Officers, Section 855, lays down the doctrine that the relation between the officer and the public is not the creature of contract, nor is the office itself a contract; that it exists, if it exist at all, as the creation of law, and "unless therefore compensation is by law attached to the office, none can be recovered"; that "a person who accepts an office to which no compensation is attached, is presumed to undertake to serve gratuitously" and that "he can not recover anything upon the ground of an implied contract to pay what the services are worth."

See also—

Sikes vs. Hatfield, 13 Gray (Mass.), 347;
Woods vs. Potter, 95 Pac., 1125;
In re Borough of Dickson, 2 Locks. Leg. N., 133;
Bynum vs. *Board,* 100 Ind., 90;
Gregory vs. *Jersey City,* 34 N. J. L., 429;
Haswell vs. *New York,* 81 N. Y., 255;
Blackburn vs. *Oklahoma,* 31 Pac., 782, 33 Pac., 708;
Sillcocks vs. *City of New York,* 11 Hun., 431;
Board vs. *Harman,* 101 Ind., 521.

What had been done by one Board under a requisition ostensibly for legal school purposes, might well be

considered to be within the contemplation of the subsequent Board. The former Board made an application for moneys necessary to maintain the schools for a stated period and then illegally squandered a portion of these funds on salaries for themselves. Was the Common Council to continue to appropriate funds to the use of the School Board, with this knowledge, and which funds might be used for such illegitimate purposes, without a protest?

By the provisions of the Act of January 27, 1904, under which the schools are being operated, the Treasurer of the School Board is under bonds to the "School District" for the faithful performance of his trust.

The Town of Nome could not sue to recover the funds that had been misappropriated; these funds when once turned over to the Treasurer of the School District for school purposes, became the funds—the property—of the school district. That corporation alone would have power to sue to recover the same. It was therefore the duty of the School Board to institute some proceeding against the former Treasurer and his bondsmen to recover the amount so illegally appropriated.

It is clear that many considerations entered into the discretion of the Common Council in passing upon the application of the School Board. That it did take action upon the application, there is no doubt, and in doing so exercised the discretion conferred upon it by Congress in deciding that only $17,500 would be avail-

able for school purposes instead of the $20,500 asked for.

Such being the case, the District Court had no power by *mandamus* to compel the Common Council to act again in the mode prescribed by it and thereby substitute its judgment in place of the judgment of the Common Council, which when passing upon the subject of the application of the School Board was acting judicially.

When it is sought to compel a public officer or board to do a particular act, it must clearly appear that the law has made it the legal duty of the officer or board to do the act, and that the act is a purely ministerial one which leaves nothing to the discretion of the officer or board.

The law on the subject is concisely and clearly expressed by the Supreme Court of the United States in the case of *U. S.* vs. *Lamont,* 155 U. S., 303, 15 Sup. Ct. Rep., 97, where that Court say:

> "The duty to be enforced by *mandamus* must not only be *merely ministerial but it must be a duty which exists at the time when the application for the writ is made.* Thus in the case of *ex parte Rowland,* 104 U. S., 604, 26 L. Ed., 861, this Court, speaking through Mr. Chief Justice Waite, said:
>
> " 'It is settled that more can not be required of a public officer by *mandamus,* than the law has made it his duty to do. The object of the writ is to enforce the performance of an existing duty, not to create a new one. Moreover the obligation must

> be both peremptory and plainly defined,—the law must not only authorize the act (*Com.* vs. *Boutwell,* 13 Wall., 526, 20 L. Ed., 631), but it must require the act to be done. "A *mandamus* will not lie against the Secretary of the Treasury unless the laws require him to do what he is asked in the petition to be made to do." (*Reedside* vs. *Walker,* 11 How., 272, 13 L. Ed., 693). See also *Secretary* vs. *McGarrahan* (9 Wall., 298, 19 L. Ed., 579); and the duty must be clear and indisputable. (*Commissioners* vs. *Aspinwall,* 24 How., 376, 16 L. Ed., 755).' "

We therefore submit in conclusion, that the petition of the School Board failed to state a cause of action or any right to the writ of mandate issued by the Court when it set up that the Common Council *had acted* upon its petition (although in a manner not satisfactory to it), even conceding argumentatively that the action was a purely ministerial one on the part of the Common Council; which, however, we have conclusively shown to be the contrary. Action having been taken on the petition, how could the writ of mandate issue to compel action?

For this reason as well as for those other reasons fully argued herein, we ask that the order of the lower court be annulled, and said court be directed to dismiss the

petition of the School Board for lack of jurisdiction to consider the matters therein set forth.

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Attorneys for Plaintiffs in Error.

CAMPBELL, METSON, DREW,
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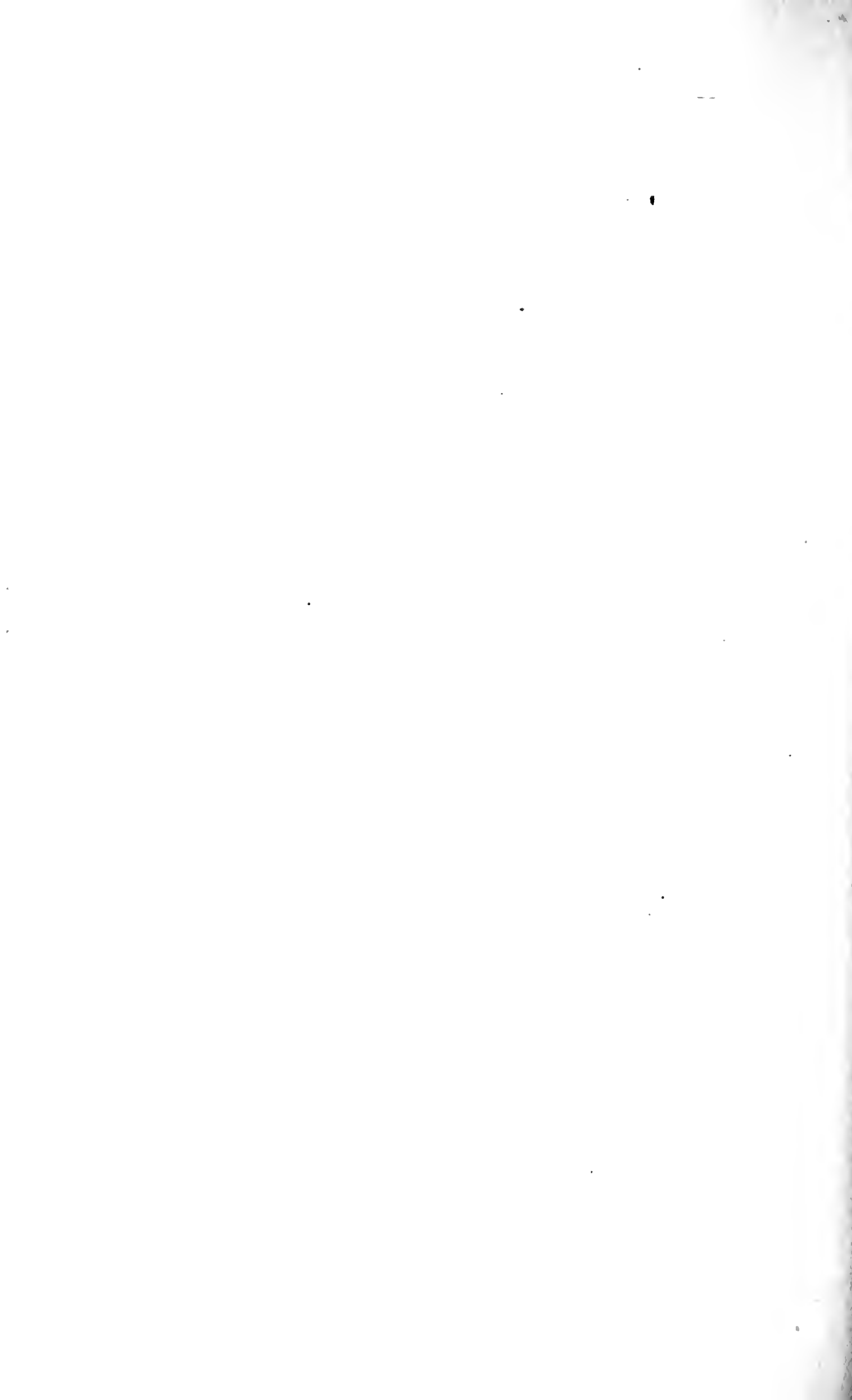
Of Counsel.



No. 1667

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

CONRAD FREEDING, PHIL ERNST, THORULF LEHMAN, A. C. CRAIG and CHARLES R. RICE, constituting the Common Council of the Town of Nome, District of Alaska,

Plaintiffs in Error,

vs.

A. A. ALLEN, JOHN H. DUNN and JOHN T. REED, constituting the School Board of the Nome School District,

Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

FILED
MAY 21 1909

ALBERT H. ELLIOT,
C. S. HANNUM,
Attorneys for Defendants in Error.

Filed this...day of May, 1909.

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By...Deputy Clerk.

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Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

Statement of Case.

The defendants in error, constituting the School Board of the Nome School District, on the 5th day of September, 1908, filed with the Clerk of the District Court for the District of Alaska, Second Di-

vision, and in open court presented to Honorable Alfred S. Morse, District Judge of said district, a verified petition praying for an order apportioning the federal license moneys collected by that court so that the petitioners, as such School Board, might receive fifty per centum, or such other per centum as the court might deem proper in the premises until the School Board should receive the full amount of $20,500.00, being the amount of moneys required for the maintenance of the public schools of Nome for the ensuing school year as fixed and determined by the School Board.

After reading said verified petition the court did, on said 5th day of September, 1908, grant the prayer of petitioners, and ordered and directed that fifty per centum of the federal license moneys collected and to be collected by the court, be paid to the School Board until they receive the amount of $20,500.00, to be expended by them for the maintenance of the public schools of the Nome School District, and found by said order so made that the amount prayed for was a fair, reasonable and just amount to be expended for school maintenance.

This order was duly filed with the clerk of the court below, September 5th, 1908.

September 10th, 1908, the court having further considered the above mentioned petition, and the order so made, made and caused to be filed with the clerk of the court, an order vacating the order of September 5th, 1908, and further ordered and di-

rected that the Common Council of the Town of Nome be and appear before the said District Court on September 12th, 1908, at 10 o'clock in the forenoon of said day, and show cause, if any there be, why the said sum of $20,500.00 should not be apportioned to the School Board out of the federal license moneys collected and to be collected by the court, or the clerk thereof, for the due maintenance of the public schools of Nome, for the ensuing school year, and that fifty per centum of all license moneys received and to be received be paid to the treasurer of the School Board until the sum of $20,500.00 has been paid to the treasurer of the School Board, and directing that a copy of the petition and the order to show cause be served upon the several members of the Common Council.

September 14th, 1908, the several members of the Common Council, as such, filed their answer and return to said petition and the order to show cause, in which answer and return the plaintiffs in error contend that the court has no jurisdiction over the subject of the action or proceeding and that it is entirely a matter of discretion of the Common Council to determine what funds are available for school purposes. That the Town of Nome is an interested party to these proceedings. That the petitioners are not parties interested and have not the capacity to sue. That the petition does not state facts sufficient to constitute a cause of action, nor sufficient facts to entitle the petitioner for the relief prayed for, or any relief.

The plaintiffs in error allege in their answer and return that former school boards had unlawfully paid out of the funds appropriated for school purposes between $3,000.00 and $4,000.00 and refused to make that sum of money available for school purposes until the present School Board exhausted its legal remedy to recover from the former treasurer of the School Board the money so alleged to have been illegally appropriated.

Plaintiffs in error further set forth in their answer and return that the amount of money to be available for school purposes will depend upon the financial condition of the town and future contingencies which may arise.

September 5th, 1908, the defendants in error served and filed their reply to the answer and return of the Common Council and denied all the material averments contained therein.

That the answer and return of the plaintiffs in error does not raise any issue as to the amount of money that will be necessary for the due maintenance of the public schools for the ensuing school year as determined by the defendants in error and set forth in their petition, but claim the right to withhold the sum of $3,000.00 of this amount because former school boards had misappropriated that sum of money which had been set aside for school purposes in former years by paying for services rendered which in the opinion of the council should have been gratuitous.

September 15th, 1908, the cause came on regularly to be heard by the court, C. S. Hannum, Esq., appearing as attorney for the defendants in error, and John Rustgard, Esq., appearing for the plaintiffs in error. No testimony was introduced by either party at the hearing and the whole matter was submitted to the court upon the pleadings and argument of counsel. The defendants in error claiming that the sole question to be determined by the court was how much money did the School Board require for school purposes; that no issue had been raised by the pleadings as to the amount required; that the question of law as to the power of the court was *res judicata.*

October 5th, 1908, the court, having duly considered the petition, answer and return of the Common Council, and the reply of the School Board, rendered its decision in writing and found the sum of $20,-500.00 to be the proper amount to be apportioned for use of the School Board for the ensuing school year from the federal license moneys. That the Common Council recommended that the request of the School Board that the $20,500.00 be made available for school purposes, with the exception that $3,000.00 thereof be deducted therefrom until such a time as the School Board has exhausted its resources at law to recover the sum of $3,000.00 claimed by the Common Council to have been illegally withdrawn from the funds of the school district by members of the former School Board. That $3,000.00 of said sum of $20,500.00 is not available for

school purposes, the same being made dependent upon the action of the School Board to recover the sum of $3,000.00 so claimed by the Common Council to have been illegally expended by former School Boards. That the sum of $3,000.00 in addition to the said sum of $17,500.00 should be made available for school purposes without regard to any liability of former members of the Nome School Board to the Nome School District.

And thereupon ordered and adjudged that the Common Council of the Town of Nome pay over to the treasurer of the Nome School Board for school purposes for the ensuing school year the additional sum of $3,000.00 from the federal license moneys now in the hands of the clerk of this court, or hereinafter to come into his hands as such clerk, and by him paid over to the treasurer of the Town of Nome.

The plaintiffs in error seek to review the proceedings had before the district court by writ of error issued by this court.

Points.

I.

That the law of this case has been settled in favor of the defendants in error by a decision of the District Court of the District of Alaska, Second Division, in the case of the Nome School Board v. the Common Council of the Town of Nome in which the

same questions of law were considered and decided which are raised in this matter from which no appeal has been taken and the same has not been reviewed by a writ of error.

II.

That the law of this case has been settled by this court in this case by an order made and entered October 12th, 1908, denying plaintiffs in error a writ of prohibition forbidding the district court from making any order in the premises, and the question at issue is therefore *res adjudicata.*

III.

That the United States statutes confer absolute power and authority upon the District Court of Alaska to apportion the federal license moneys collected in incorporated towns for school purposes and that it is made the duty of the district court to set apart not less than twenty-five per cent nor more than fifty per cent of such federal license moneys for school purposes.

IV.

That no appeal can be taken from the decision of the court nor can its decision be reviewed by writ of error, except upon a clear showing of abuse of discretion. That no attempt is made herein to show abuse of discretion and there can be no abuse of discretion if the court in the exercise of its functions does not set apart less than twenty-five per centum

nor more than fifty per centum of the federal license moneys for school purposes, as required by statute.

V.

That the plaintiffs in error have not shown or attempted to show any abuse of discretion on the part of the court, but that the lower court in acting under the statutes in question was performing a ministerial and not a judicial function and the appellate court is without jurisdiction to review the acts of the district judge under the facts at bar without a clear showing of abuse of discretion.

VI.

That the power and authority to determine the amount of money necessary for the due maintenance of the public schools in incorporated towns is vested in the School Board by law of Congress and not in the Common Council.

VII.

That the School Board in incorporated towns is a body created by acts of Congress, distinct and separate from the Common Council, having its powers, authority and duties defined by the law which creates it. and is elected by the people; that the Common Council has no authority over or control of the School Board.

VIII.

That the power and authority to determine the amount of the federal license moneys collected in in-

corporated towns to be used for school purposes is exclusively vested in the District Court of Alaska within the limits prescribed by law.

IX.

That the act of Congress entitled "An Act to " Amend and Codify the Laws relating to Municipal " Corporations in the District of Alaska, Approved " April 28th, 1904", does not repeal "An Act " Amending the Civil Code of Alaska, Providing for " the Organization of Municipal Organizations and " other purposes", approved March 2nd, 1903, in which act the power is conferred upon the district court to apportion the federal license moneys for school purposes, nor do the acts of Congress approved January 27th, 1905, and March 3rd, 1905, repeal the law conferring upon the court that power and authority.

Argument.

March 3rd, 1899, Congress passed an act to define and punish crime in the District of Alaska and to provide a code of criminal procedure for said district.

U. S. Statutes at Large, vol. 30, ch. 429, p. 1253.

This act also provides a tax on business and trade conducted and carried on in the district.

id., Sec. 460, p. 1336.

The moneys collected as taxes under the provisions of this act are generally designated and referred to as "the federal license moneys" and the term "federal license moneys" frequently used in this cause, has exclusive reference to the taxes collected on trade and business under the act above mentioned.

By the requirements of this act, any person or persons, corporation or company, prosecuting or attempting to prosecute any of the lines of business designated therein shall first apply for and obtain license so to do from the district court and pay for said license.

id., sec. 460.

All licenses shall be issued by the clerk of the district court in compliance with the order of the court or judge thereof, duly made and entered. All license moneys collected by the clerk under the provisions of this act were originally required to be covered into the Treasury of the United States.

id., sec. 463, pgs. 1337-8.

Subsequently Congress passed an act, approved June 6th, 1900, making further provision for a civil government for Alaska and for other purposes, and included in the latter act the same provision for tax on business and trade with some amendments as to the amount of taxes to be collected on certain specified business.

U. S. Statutes at Large, vol. 31, ch. 786, pg. 321. Sec. 460, pg. 330.

Section 463 of the former act was also amended by the latter act by providing that all moneys received for licenses by the district court or its clerk, shall be covered into the Treasury of the United States, except as otherwise provided by law.

id., pg. 332, sec. 463.

The act of June 6th, 1900, provides for the incorporation of towns in the District of Alaska, and provides for the election of seven members for the Town Council and defines their powers.

id., S. Statutes at Large, vol. 31, pg. 520.

Among the powers conferred upon the Common Council by this first act permitting the incorporation of towns is to provide by ordinance for the maintenance of the public schools.

id., pg. 521, subdivision 4 of sec. 201;
Carter's Code (Alaska), sec. 201, subdivision 4, pg. 394.

This act also provides for the election of a School Board of three directors who shall have the *exclusive supervision and management and control of the public schools and school property within the municipal corporation* and shall be elected in the same manner and for the same term as the Council.

id., pg. 521, sec. 202.

By the provisions of this act the treasurer of the corporation shall be ex-officio Treasurer of the School Board. He is required to take the prescribed oath

of office and execute a bond in an amount to be determined by the *district judge and approved by him and the Common Council.*

id., pg. 521, sec. 203.

It is also provided by this act that fifty per centum of all license moneys to be collected by the act above referred to from business and trade carried on within such corporation shall be paid over by the clerk of the district court receiving the same, to the treasurer of said corporation to be used *exclusively for school purposes.*

id., pg. 521, sec. 203.

The above section, 203, was amended by act of Congress approved March 3rd, 1901, by providing that *where it is made to appear to the satisfaction of the district court* that the fifty per centum of the federal license moneys to be paid by the clerk of the court to the town treasurer is not required for school purposes, *the court may from time to time by orders duly made and entered authorize the expenditure of the accumulated surplus, or any part thereof, for designated municipal purposes,* to be determined by the order of the court.

id., vol. 31, pg. 1438.

It is made evident by reference to all of these statutes that Congress at all times intended that the federal license moneys should be safeguarded for the benefit of the public schools. It first provided that fifty per centum should be paid to the Treasurer of

the School Board to be used exclusively for school purposes.

It is fair to presume that the attention of Congress was directed to the fact that fifty per centum of the federal license moneys were not required for the due maintenance of the public schools and it was induced to amend the law, but in doing so, it again protected the school fund by requiring that, before any part of this fifty per centum of license moneys set apart for school purposes, could be made available for municipal expenditure, the district court must pass upon and determine whether the needs of the public schools required the full fifty per centum, and in the event they did not, it was left to the court, and not to the Common Council, to determine for what municipal purpose the surplus could be used. Congress did not intend that the Common Council should have any control over the federal license moneys. It preferred to leave the matter under the control of the district court, the judge of which is created by act of Congress and appointed by the President.

Section 203 of the act of 1900, as amended by the act of March 3rd, 1901, was again amended by an act of Congress entitled "An Act Amending the Civil Code of Alaska", and providing for the organization of corporations and for other purposes, approved March 2nd, 1903.

> U. S. Statutes at Large, vol. 32, part 1, pg. 946.

This amendment expressly provides that all license moneys provided for by the acts of Congress required to be paid for the several kinds of business carried on in the district in incorporated towns, shall be used for municipal and school purposes, in such proportions *as the court may order,* but not more than *fifty per centum nor less than twenty-five per centum thereof shall be used for school purposes.* The remainder thereof to be paid by the clerk of the court to the town treasurer for the support of the municipality.

id., pg. 946, sec. 203.

Congress, by this express provision of law has again declared its intention to protect the public school fund in incorporated towns, and has again prevented the Common Council from controlling the funds designated by Congress to be used for school purposes; and has again required the court to make an order designating the amount of the federal license moneys to be set apart for school purposes within the limits prescribed by Congress—namely *not less than twenty-five nor more than fifty per centum.*

It is also made clear by the language of the statute that the Common Council should not exercise any control over this fund, as it expressly provides that after the court has determined by order duly made and entered the amount to be used for school purposes, that the remainder thereof shall be paid to the town treasurer for the support of the munici-

pality. The intent of Congress to protect the public schools of Alaska generally, is further manifested by the concluding provision contained in section 203, which directs that fifty per centum of all license money collected outside of incorporated towns shall be covered into the Treasury of the United States and set aside to be expended under the direction of the Secretary of the Interior for school purposes outside of incorporated towns in Alaska.

This brings us to the consideration of the act of Congress bearing upon the questions involved in this cause, entitled "An Act to Amend and Codify the " Laws Relating to Municipal Corporations in the " District of Alaska, Approved April 28th, 1904".

U. S. Statutes at Large, vol. 33, part 1, p. 529.

Under subdivision twelve of section four of said act, page 532, it is made the duty of the Common Council to establish one or more school districts, to provide the same with suitable school houses and to provide the necessary funds for the maintenance of schools. When the council has complied with this provision of the law, its functions are at an end so far as the public schools are concerned, as the statute then expressly provides that

> *"Such school districts and schools when established shall be under the supervision and control of a School Board of three members, a director, a treasurer and a clerk".*

to be elected, qualify and hold office, as provided by said subdivision 12 of section 4, above cited.

The section further provides that all money available for school purposes, except for the construction and equipment of school houses and the acquisition of sites for the same, *shall be transferred to the treasurer of the School Board, to be expended under the direction of the School Board.*

The concluding part of subdivision 12, section 4, above cited, expressly confers upon the School Board the exclusive power to hire and employ the necessary teachers, to provide for heating and lighting the school houses, and *in general to do and perform everything necessary for the*

DUE MAINTENANCE OF A PROPER SCHOOL.

Section 6 of the same act, page 533, provides that the *town treasurer* shall pay over to the *Treasurer of the School Board* all moneys available for the maintenance of schools.

By the provisions of the law above cited, it is clearly made the duty of the School Board to determine the amount of money necessary for the due maintenance of the school.

The money necessary for the maintenance of the public schools can only be obtained by the School Board from two sources, as the law does not confer upon it the power to levy and collect taxes for such purposes.

First. From the federal license moneys, the amount of which is to be determined by the order

of the court, within the limits prescribed by law, as above stated. This amount is made available for school purposes solely by acts of Congress from the federal license moneys over which the Common Council has no authority or control, and which Congress, by its act has very wisely prevented from falling into the hands of the Common Council.

Second. If the amount of money derived from the federal licenses be insufficient to maintain the schools, it is then incumbent upon the Common Council to provide the balance by taxes levied upon the real and personal property within the municipality subject to taxation.

The next act of Congress was approved January 27, 1905, entitled "An Act to Provide for the Con-
" struction and Maintenance of Roads, the Estab-
" lishment and Maintenance of Schools, and the
" Care and Support of Insane Persons, in the Dis-
" trict of Alaska, and for other purposes".

U. S. Statutes at Large, vol. 33, chap. 277, p. 616,

Section 3 of this act, id., p. 617, adds a new feature to the school system for Alaska by making the Governor of the district ex-officio Superintendent of Public Instruction and, as such, is given supervision and direction of the public schools in said district and it is made his duty to prescribe rules and regulations for the examination and qualification of teachers.

Section 4 re-enacts the same provisions charging the Common Council of the incorporated towns with the duty in their respective towns of establishing school districts and providing suitable school houses and maintaining public schools therein, and providing the necessary funds for the schools, as contained in the former acts cited.

The words "to provide the necessary funds for the " schools" cannot have any reference to the federal license moneys. Congress has deemed it proper to aid and assist public schools with the federal license moneys, but has at all times directed that the court shall regulate the amount of money to be used for such purposes, in incorporated towns, and the Secretary of the Interior in all other parts of Alaska. All schools outside of incorporated towns are controlled by commissioners who hold office by appointment through the Department of the Interior. Congress has also aided in the construction of roads and bridges and has set apart portions of the federal license moneys for these purposes, but at all times has retained the absolute control of this fund, and now has the absolute control of it, and can designate by law the purposes for which it shall be expended and change the same at its will.

Section 4 of the act of January 27th, 1905, does not in any manner by express or implied provision enlarge the powers of the Common Council over school matters, nor does it directly nor by implication give to the Common Council any authority to

determine the amount of the federal license money that shall be especially applied to school purposes, but the act does change the tenure of office of the members of the School Board so that one member shall be elected each year and hold office for a term of three years and provide for the filling of vacancies. An error was apparently committed in the preparation of this act, as it provided that the first School Board elected shall hold office for two and three years. To correct this error, another act was passed identical in terms, approved March 3rd, 1905, providing that the first School Board elected shall hold office for a term of one, two and three years.

U. S. Statutes at Large, vol. 33, p. 1262.

The latter act however, did not contain section 3 of the former one, which made the Governor ex-officio Superintendent of Public Instruction. With the same degree of logic, the plaintiffs in error might contend that this section was repealed, because it was not re-enacted in the latter act, and that the Governor of Alaska therefore is not ex-officio Superintendent of Public Instruction. Counsel have used this kind of reasoning to sustain their position that the power given to the district court to apportion the federal license money was repealed because it was not mentioned in every subsequent act passed by Congress relating to public schools and municipal corporations in the District of Alaska.

The defendants in error contend that the act does not in express terms or by implication repeal the act

which charged the district court with the duty of determining the amount of federal license moneys to be used for the maintenance of public schools: that the statute which conferred this power and duty upon said court was in fact preserved by the latter act, and that the powers of the Common Council over the public schools were further restricted, and the powers of the School Board enlarged. By the terms of the latter act, it took away from the town treasurer the school fund and reposed it in the hands of the Treasurer of the School Board, showing conclusively that it was clearly the intention of Congress to eliminate all possible friction that might arise between the two bodies, leaving each body in absolute control of the duties and functions imposed upon it by Congress and each one accountable to the electors who choose them.

By reference to the statute above referred to, it will be observed that the Common Council is elected by the male citizens of the United States, over 21 years of age, residing within the municipality; that the school board is elected by all adult citizens, and by persons who have declared their intention to become citizens of the United States, residing within the school district. It will also be observed, by reference to the statute above cited, that the boundary lines of the school district may or may not be co-extensive with the boundary lines of the municipality.

Section 8, page 534, of the latter act, above cited, clearly shows that Congress did not intend to repeal

all former acts, but only such act and parts of acts that were inconsistent, and then only to the extent of the inconsistency.

In view of the fact that in all former acts of Congress it preserved to the school fund the whole or a part of the federal license money and charged the district court with the duty of seeing that the will of Congress was carried out, and in view of the fact that the latter act restricted the powers of the Common Council and enlarged the powers of the School Board in relation to all matters pertaining to public schools, it is not reasonable to suppose that the latter act is intended to ultimately and finally withdraw the protection with which it had heretofore surrounded the school fund.

The subject of legislation providing for the collection of license taxes and the disposition of the taxes when collected, was not considered, nor did it constitute a part of the legislative subject relating to municipal corporations in the District of Alaska and codifying and amending the laws in relation thereto.

Congress has the absolute control over the license moneys collected in Alaska under the provisions of the law enacted by it, and it has never conferred upon the Common Council of incorporated towns, nor the School Board, the power to control the license fund in any particular or to determine the amount of the license money to be set apart for school purposes. It retained that power in the district court, after the court had determined the amount to be used

for school purposes, and this sum had been covered into the treasury of the School Board, the balance was to be paid to the Treasurer of the Common Council. Up to this point neither of the local bodies had any power or authority over the federal license moneys.

Therefore there can be no inconsistency or repugnancy between the Act to Amend and Codify the Municipal Laws of Alaska, and the Laws Providing for the Collection of the License Tax and the Disposition of the same.

An implied repeal only results from some enactment, the terms and necessary operation of which cannot be harmonized with the terms and necessary effect of an earlier act.

> Southerland's Statutory Construction, vol. 1, sec. ed., sec. 247, p. 461.

The intention to repeal will not be presumed, nor the effect of repeal admitted, unless the inconsistency is unavoidable and only to the extent of repugnance.

> id., p. 464;
> Williams v. People, 132 Illinois 574.

The act to amend and codify the laws relating to municipal corporations in the District of Alaska, above referred to, has no relation to nor connection with the laws of Congress providing a license tax on business and the disposition of the taxes when collected: neither does the act to amend and codify the laws, above mentioned, make any change in the system of collecting federal license moneys and dispos-

ing of the same, therefore, it cannot be inferred that Congress intended to repeal any of the former acts in relation thereto, and did not attempt, in the latter act, to formulate a new system for the disposition of those moneys as a substitute for the old one.

It is necessary, to a repeal by implication, by a statute covering the whole subject matter of a former one, that the objects of the two statutes be the same.

U. S. v. Claflin, 97 U. S. p. 546;
The J. D. Peters, 78 Fed. (see Opinion, pp. 372-3-4).

In construing statutes *in pari materia* of different dates, the last shall repeal the first only when there are express terms of repeal, or when the implication of repeal is a necessary one.

Wilmot v. Mudge, 103 U. S. p. 217;
U. S. v. Hogg, 112 Fed. p. 909.

Repeals of statutes by implication are not favorable and are never admitted when the former can stand with the new act.

U. S. v. Levois, 17th How. p. 85;
The J. D. Peters, 78 Fed. Opinion p. 373;
The Adula, 127 Fed. p. 857.

A later act will not be held to repeal a prior one unless there is a positive repugnancy, and even then only to the extent of such repugnancy.

U. S. v. Matthews, 173 U. S. p. 381;
The New York, C. C. A. 47, p. 232, 108 Fed. 102;
The J. D. Peters, 78 Fed. Opinion p. 373.

A repeal of a statute by implication is not favored and is never admitted when two acts can be reconciled.

McCool v. Smith First Black, 459, 17 Law Ed. 218.

The title of an act may be considered to aid construction.

The New York, 47 C. C. A. p. 232.

If Congress intended to confer on the Common Council the authority to determine the amount of the federal license moneys to be used for school purposes, there is nothing in the law to evidence any such intention. The striking omission to express such an intention, raises the legal presumption that it did not exist, and forbids the courts from importing it into the law and giving it effect.

Union Cent. Life Ins. Co. v. Chaplin et al., 54 C. C. A. 248.

If the act of Congress to amend and codify the laws of municipal corporations of Alaska, was intended as an amendment to the act conferring upon the district court the power to determine the amount of the federal license moneys to be used for school purposes, the amendatory act is void for two reasons:

First—that the title of the act amended or revised is not referred to, and

Second—the act as revised, or section as amended is not set forth and published at full length.

Southerland on Statutory Construction, Sec. ed., vol. 1, section 231, p. 432.

When a section is amended by adding or inserting certain words or provisions and enacted as amended, and the same section is again amended in another particular, not inconsistent with the first, and re-enacted, omitting the words inserted in the first amendment, and entirely ignoring the amendment, the first amendment is not repealed.

Southerland on Statutory Construction, 2nd ed., vol. 1, section 234, p. 439.

If two statutes can be read together without contradiction or repugnance, or absurdity, or unreasonableness, they should be read together, both will have effect, and it is not enough to justify the inference of repeal that the latter law is different: it must be contrary to the prior law and there must be a positive repugnancy, and even then, the old law is repealed by implication only to the extent of the repugnancy.

Southerland on Statutory Construction, 2nd ed., section 267;

Wood v. U. S., 16 Pet. pp. 342 to 363.

Bandright v. Schoettler, 64 C. C. A. Opin. p. 216;

U. S. v. Leng, 18th Fed. Opin. p. 20;

U. S. v. Cal. & Or. Land Co., 148 U. S. p. 31.

Judicial acts are conclusive except when a method of reviewing the same are given by statute.

School District No. 2 v. Lambert, 28th Oregon 223;

U. S. v. Cal. & O. Land Co., 148 U. S. p. 31.

An officer given discretionary powers by statute is the sole judge of the right to exercise such powers and acts done under his discretion are presumed to be legal.

Martin v. Mott, 12th Wheat. 19;

The Japanese Immigrant Cases, 189 U. S. Opin. p. 98;

Burson v. McMahon, 127 U. S. 457;

Humpson v. Weare, 66 Am. Dec. 116;

Cooper v. Sunderland, 66 Am. Dec. p. 52.

The statement of plaintiffs in error beginning with "therefore", last paragraph, page 2, down to and including the word "Dollars" of the same paragraph, page 3 of the transcript, is not a fair statement of fact, for the reason that the report of the Finance Committee of the Common Council does not state that the $20,500.00 requested by the School Board is unreasonable, or that a lesser amount will be ample for school purposes, but seek to justify the withholding of $3,000.00 because of an alleged misappropriation of funds by former School Board.

Trans. 16-17.

The report of the Finance Committee was approved August 26, 1908 (see "exhibit C" to petition, trans. p. 16).

The necessities of the school were made the secondary consideration by the Common Council. It would deprive the schools of the necessary funds with which to maintain them because, in the opinion of the council, a former School Board had illegally used some of the school funds in paying salaries for services rendered, which did not meet the approval of the Common Council.

The plaintiffs in error claim the right to receive the whole of the federal license money and dispose of the same at their will and pleasure.

This is made apparent from the concluding part of the report of the Finance Committee approved by the deliberate action of the Common Council, to wit: "We therefore recommend that the sum of $17,-
"500.00 be made available for school purposes for
"the current year, and that said sum be set aside in
"such amounts and at such times *as the finances of*
"*the city will permit,* the intent being to set aside
"and transfer to the treasurer of the School Board
"the full amount of $17,500.00 *as soon as possible*". This clearly indicates the intention of the Common Council to make the school fund depend upon the finances of the city. The Common Council, if it is possible to provide $17,500.00 for school purposes, will do so: otherwise, the school must take the lesser amount. This is again evidenced by the verified answer and return of plaintiffs in error in the following language, contained in paragraph 6, page 32 of the transcript.

" That the amount of money to be made available " for school purposes in the Town of Nome, during " the ensuing year will depend upon the financial " condition of the town."

And quoting again from the same paragraph:

" The amount available for school purposes is de- " pendent entirely upon future contingencies."

Notwithstanding that the laws of Congress expressly require the Common Council to provide the funds necessary for school purposes without depending contingencies, the Common Council is willing to place itself on record as making the school fund depend entirely upon future contingencies.

The attitude of the council is simply this, that inasmuch as Congress has deemed it wise to place the control and management of the public school in a School Board, the Common Council, possessing the sole power of taxation, will regulate the sum to be made available for school purposes, and by its act neutralize the efficiency of the School Board: and in this instance it has made the amount of money available for school purposes, including the entire federal license moneys, depend upon future contingencies and the needs of the various departments of the municipal government. Fortunately for the benefit of the pupils of the public schools of Alaska, Congress has safeguarded the federal license money for their benefit, and prevented it from falling under the control of those who would make it depend upon future

No. 1668

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

P. G. NIVEN,

Plaintiff in Error,

vs.

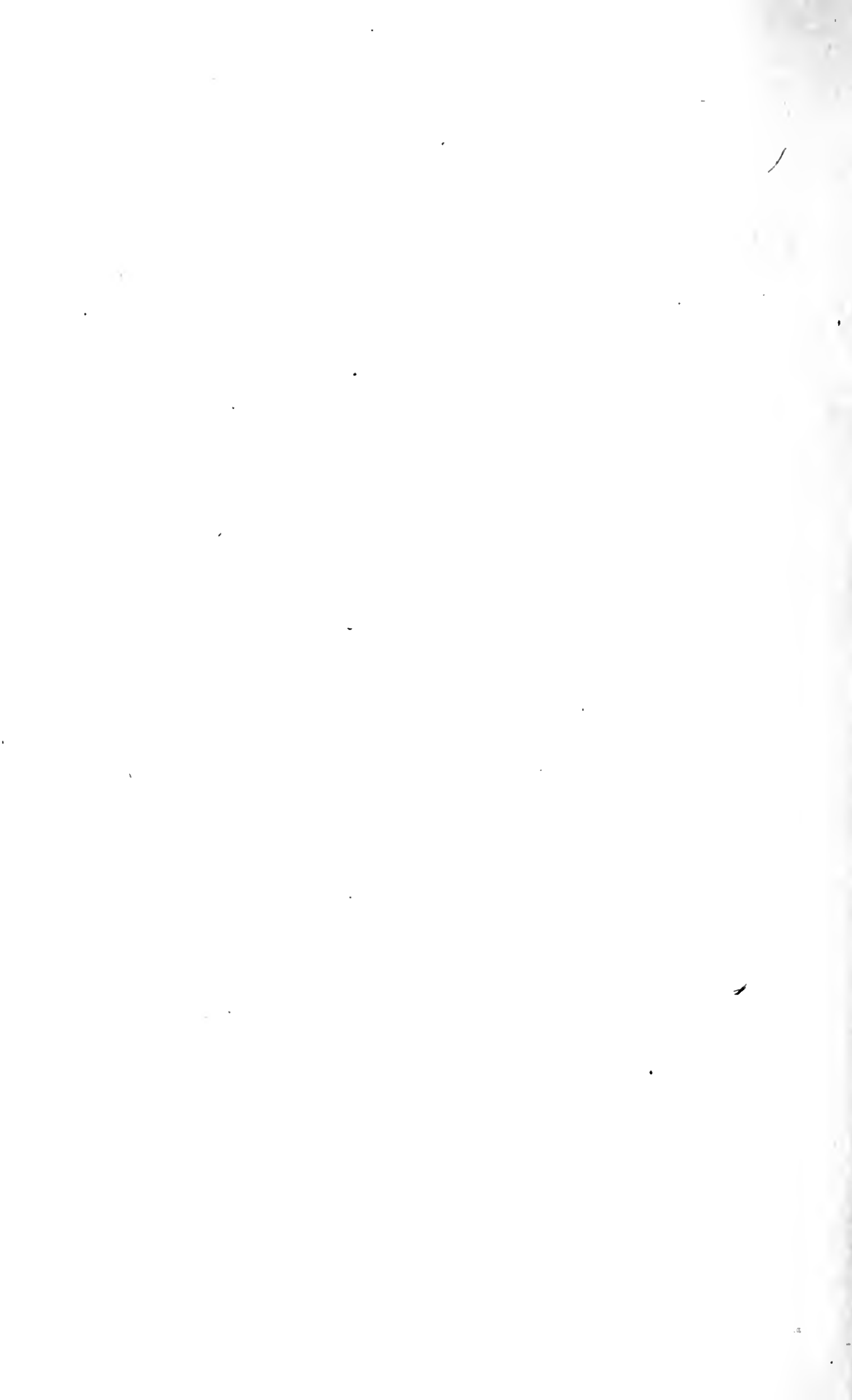
THE UNITED STATES OF AMERICA,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3248.

UNITED STATES OF AMERICA,

Defendant in Error,

vs.

P. G. NIVEN,

Plaintiff in Error.

[Names and Addresses of] Counsel.

ELMER E. TODD, United States District Attorney, Lowman Building, Seattle Washington.

CHARLES T. HUTSON, Assistant U. S. District Attorney, Pioneer Building, Seattle, Washington.

JAMES M. ASHTON, Attorney for Defendant and Plaintiff in Error, Fidelity Building, Tacoma, Washington.

In the United States District Court for the Western District of Washington, Northern Division.

No. 3248.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

P. G. NIVEN,

Defendant.

Information.

Be it remembered, that Jesse A. Frye, United States Attorney for the Western District of Wash-

ington, who for the United States in this behalf prosecutes, in his own person comes here into the District Court for the United States for the district aforesaid on this 19th day of April, 1906, and for the United States gives the Court here to understand and be informed that the said defendant, P. G. Niven, is now and at all the times hereinafter mentioned, was, the master of the British steamship "Wyneric"; said vessel having arrived at the port of Tacoma, Washington, from Panama on the 26th day of December, 1905; that there was then on board said steamship—an alien, to wit, one William Hall, who was then and there a seaman on said vessel; that on the 29th day of December, 1905, the said William Hall was duly examined by a board of special inquiry convened as by law required, and on the said 29th day of December, 1905, said board of inquiry found that the said William Hall was an alien and suffering from consumptive tendency very marked, and liable to become a public charge, and therefore not entitled to admission to the United States, and was by said board on said date refused a landing in the United States and ordered returned to the country from whence he came, at the expense of the said steamship "Wyneric"; that on the said 29th day of December, 1905, in said District, the said P. G. Niven, then and there being such master of said steamship "Wyneric" as aforesaid, unlawfully and wrongfully did refuse to receive back on board the said steamship the said William Hall so brought into the United States by said steamship and refused ad-

mission to the United States as aforesaid; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And that the said United States attorney, who prosecutes as aforesaid for the United States, further gives the Court here to understand and be informed, that the said defendant, P. G. Niven, is now and at all the times hereinafter mentioned was, master of the British steamship "Wyneric," said vessel having arrived at the port of Tacoma, Washington, from Panama, on the 26th day of December, 1905; that there was then on board said steamship—an alien, to wit, one William Hall, who was then and there a seaman on said vessel; that on the 29th day of December, 1905, the said William Hall was duly examined by a Board of Special Inquiry convened as by law required, and on the said 29th day of December, 1905, said Board of Special Inquiry found that the said William Hall was an alien and suffering from consumptive tendency very marked, and liable to become a public charge and therefore not entitled to admission to the United States, and was by said board on said date refused a landing in the United States, and ordered returned to the country from whence he came, at the expense of the steamship "Wyneric"; that on the said 29th day of December, 1905, in said District, the said P. G. Niven then and there being such master of said steamship "Wyneric," as aforesaid, did unlawfully and wrongfully neglect to detain on board said steamship "Wy-

neric'' the said alien William Hall; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the said United States Attorney, who prosecutes as aforesaid for the United States, further gives the Court here to understand and be informed, that the said defendant, P. G. Niven, is now, and at all the times hereinafter mentioned was, the master of the British steamship "Wyneric," said vessel having arrived at the port of Tacoma, Washington, from Panama, on the 26th day of December, 1905; that there was then on board said steamship—an alien, to-wit, one William Hall, who was then and there a seaman on said vessel; that on the 29th day of December, 1905, the said William Hall was duly examined by a Board of Special Inquiry convened as by law required, and on the said 29th day of December, 1905, said Special Board of Inquiry found that the said William Hall was an alien and suffering from consumptive tendency very marked, and liable to become a public charge, and therefore not entitled to admission to the United States, and was by said Board on said date refused a landing in the United States, and ordered returned to the country from whence he came, at the expense of the said steamship "Wyneric"; that on the said 29th day of December, 1905, in said District, the said P. G. Niven, then and there being such master of said steamship "Wyneric," as aforesaid, wrongfully and unlawfully did refuse and neglect to return the said alien Will-

iam Hall to the foreign port from whence he came, to wit, Panama; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Whereupon, the said United States Attorney, who prosecutes as aforesaid for the United States of America, prays the consideration of the Court in the premises, and that due process of law be awarded against the said P. G. Niven in this behalf.

JESSE A. FRYE,
United States Attorney.

Leave to file is hereby granted in open court this 19th day of April, 1906. Let a warrant issue. Bail fixed at $300.00.

C. H. HANFORD,
Judge.

[Endorsed]: Information and Order. Filed Apr. 19, 1906. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

[Bench Warrant.]

United States of America,
Western District of Washington,—ss.

To the Marshal of the United States of America, for the Western District of Washington, his Deputies, or any or either of them, Greeting:

[Seal]

Whereas, at a District Court of the United States of America, for the Northern Division, Western District of Washington, begun and held at the City

of Seattle, within and for the District aforesaid, on the nineteenth day of April, in the year of our Lord one thousand nine hundred and six, Jesse A. Frye, Esq., United States Attorney for the Western District of Washington, presented on behalf of the United States of America, a Criminal Information against P. G. Niven, for the violation of Section 19, of the Act of March 3, 1903 (Violation of the Immigration Laws of the United States of America), as by the said information, now remaining on file and of record in said Court, will more fully appear; to which information the said P. G. Niven, has not yet appealed or pleaded;

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said P. G. Niven, and him bring before the said Court, at the United States District Courtroom, in the city of Seattle, forthwith, to answer the Information aforesaid.

Witness: The Hon. C. H. HANFORD, Judge of the said District Court, and the seal thereof, at the city of Seattle, this 19th day of April, A. D. 1906.

Attest: R. M. HOPKINS,
Clerk.

JESSE A. FRYE,
Esq., U. S. Attorney.

MARSHAL'S OFFICE.

United States of America,
Western District of Washington.

In obedience to the Warrant, I have the body of the said P. G. Niven before the Honorable, the Dis-

trict Court of the United States, in and for the Western District of Washington, this 20th day of April, A. D. 1906.

C. B. HOPKINS,
U. S. Marshal.
By Fred M. Lathe,
Deputy U. S. Marshal.

Marshal's Fees:

Service	$2.00
Expense	1.40
Releasing on Bond	.50
	3.90

[Endorsed]: Bench Warrant. Bail Fixed at $300.00. C. H. Hanford, Judge. Filed in the U. S. District Court, Western Dist. of Washington. Apr. 20, 1906. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3248.

UNITED STATES OF AMERICA,

vs.

P. G. NIVEN.

Arraignment and Plea.

Now, on this 21st day of April, 1906, into open court comes said defendant P. G. Nevin, and being asked if the name by which he is informed against is his true name, replies; "It is." Whereupon the

information is read to him and he here and now enters his plea of not guilty, to the charge in the information herein against him.

Entered in Journal, U. S. District Court, Vol. 1, page 107.

In the United States District Court for the Western District of Washington, Northern Division.

No. 3248.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

P. G. NIVEN,

Defendant.

Stipulation [of Facts].

It is stipulated by the parties hereto, the plaintiff United States of America appearing by Elmer E. Todd, Esq., United States Attorney, and Charles T. Hutson, Assistant United States Attorney, and the defendant P. G. Niven appearing by James M. Ashton, Esq., his attorney: that the facts in this cause, and all material facts therein, are as follows, to wit:

The defendant is the master of the British steamship "Wyneric." The ship arrived in the port of Tacoma, December 26, 1905, in this District from the port of La Boca, Panama, having on her articles as an ordinary seaman, one William Hall. At the time of her arrival fifteen men of her crew, of whom Hall was one, were ill of malarial fever, contracted prob-

ably at La Boca. The master had his crew examined by two competent physicians, one of whom was Dr. Charles McCutcheon, superintendent and physician in charge of the Fannie Paddock hospital in Tacoma, the other, Dr. Frederick J. Shugg, physician and surgeon of the United States Marine Hospital Service.

By the advice of these two physicians, these fifteen sick seamen, of whom Hall was one, were sent from the ship to the Fannie Paddock hospital for treatment. On the 27th day of December, 1905, the master of the ship received from the United States Immigration Inspector in charge at Seattle, Washington, a notice in words and figures as follows, the original of which is attached hereto and hereby made a part hereof:

[Notice, Dated Dec. 27, 1905, from Immigration Inspector to Master of Steamship.]

DEPARTMENT OF COMMERCE AND LABOR.
IMMIGRATION SERVICE.

Office of the Inspector in Charge,

Seattle, Wash., Dec. 27, '05.

To the Master of the S. S. "Wyneric,"

Sir: Section 18 of the Act approved March 3, 1903, reads:

"That it shall be the duty of the owners, officers, and agents of any vessel bringing an alien to the United States to adopt due precautions to prevent the landing of any such alien from such vessel at any time and place other than that designated by the Im-

migration Officers, and any such owner, agent, officer, or person in charge of such vessel, who shall land or permit to land any alien at any other time and place than that designated by the Immigration Officers and shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be punished by a fine for each alien so permitted to land of not less than One Hundred or more than One Thousand Dollars, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment, and every such alien so landed shall be deemed to be unlawfully in the U. S. and shall be deported as provided by law.

In pursuance of the foregoing act of Congress, you are hereby directed to prevent the landing of the aliens listed below until his right to do so has been determined by a duly qualified immigration officer, or immigrant officers.

Rule 13, Immigration Regulations, dated August 26, 1903, provide:

That at least twenty-four hours in advance of the intended time of sailing, the master, agent, owner or consignee of any vessel, shall notify the Immigration Office at the port of departure. You are, therefore, hereby notified that such report should be made,

either in person, by telephone, or otherwise, twenty-four hours prior to the departure of your vessel.

Immigration Office telephone is Main 644.

UNITED STATES IMMIGRATION INSPECTOR IN CHARGE.

Per H. H. ADAMS,
Immigration Inspector.

Service hereby acknowledged.

WM. HALL.
WM. HOLMES.
G. W. KELLY.
J. YOUNG.

That thereafter on the 28th day of December, 1905, the master of said vessel sent to the Immigration Service a letter, of which the following is a true copy:

[Letter Dated Dec. 28, 1905, from Master of Steamship to Immigration Inspector.]

Wyneric, Tacoma, Dec. 28th, 1905.

Mr. Alexander S. Fulton, U. S. Immigrant Inspector, Tacoma.

Dear Sir: I beg to request that you grant me permission to discharge the following men from the British steamer "Wyneric," who are not in a condition to fulfill their duties on the intended voyage:

J. W. Kelly.
W. Holmes.
W. Hall.

Respectfully,
P. G. NIVEN,
Master S. S. "Wyneric."

That thereafter, the inspectors of the Immigration Department at Tacoma, on the 29th day of December, 1905, made and had a proper examination of the crew of the "Wyneric," and upon the report of Dr. F. J. Shugg, physician in the United States Marine Hospital Service, as aforesaid, found said William Hall to be of a consumptive tendency and liable to become a public charge, and on the 30th day of December, 1905, notified the master and owners of the "Wyneric," in writing, in terms and figures as follows, which notice was duly received by the master of the "Wyneric," the original of said notice being hereto attached and hereby made a part hereof, together with notice received by said master and certificate of Dr. F. H. Shug, in words and figures as follows:

[Notice, Dated Dec. 30, 1905, from Immigration Inspector's Office to Owner of Steamship.]

OFFICE OF THE U. S. COMMISSIONER OF IMMIGRATION.

Port of Tacoma, Wash., December 30, 1905.

To the Owners of the S. S. "Wyneric," in Port, Tacoma, Wash.

Sirs: You are hereby notified that the aliens hereinafter named, who reached this port on the above-named vessel on Dec. 26th, 1905, have, for the reasons stated below, been duly excluded from ad-

mission into the United States, and you are therefore required to return them to the port from which they came.

Wm. Holmes, Blindness right eye. L. P. C.

G. W. Kelley, Tertiary syphilis. L. D.

Wm. Hall, Consumptive tendency. L. P. C.

Service hereby acknowledged Dec. 30, 1905, 11:40 A. M.

MASTER S. S. WYNERIC.

A. H. GEFFNEY,

Acting Inspector in Charge.

Per A. S. FULTON,

Immigrant Inspector.

[Certificate, Dated Dec. 26, 1905, of Doctor Shug.]

DEPARTMENT OF COMMERCE AND LABOR.

IMMIGRATION SERVICE.

Medical Division.

Port of Tacoma, Wash., Dec. 26, 1905.

Name, Wm. Hall. Nation, England. Race, White. S. S. "Wyneric." Arrived Dec. 26, 1905.

This is to certify that the above-described immigrant has Consumptive tendency, very marked, affecting ability to earn a living.

F. J. SHUG,

Surgeon, P. H. and M. H. S. in Charge.

To the Commissioner of Immigration:

Two other members of the crew of the "Wyneric" were found to be ineligible by the Immigration authorities, and at the request of the master of the "Wyneric" the immigration authorities took these

two men in charge and transported them from the port of Tacoma to Port Townsend, and detained them there until the ship departed from that port on her outward voyage. The original accounts rendered by the Immigration Department for this service are hereto annexed and hereby made a part hereof as follows:

[Account, Dated Jan. 17, 1906, of Immigration Department.]

DEPARTMENT OF COMMERCE AND LABOR.
IMMIGRATION SERVICE.

Office of Inspector in Charge Seattle, Wash.
Port Townsend, Wash., Jan. 17, 1906.

British Steamer "Wyneric" to United States Detention House. Dr.

1906.

Jan 1-17. For maintenance of aliens Wm. Holmes and G. W. Kelly ex. above vessel.... ......$23.00

Received payment:

O. P. ROBINSON,
Immigrant Inspector.

[Account, Dated December 31, 1905, of Immigration . Department.]

DEPARTMENT OF COMMERCE AND LABOR.

IMMIGRATION SERVICE.

Office of Inspector in Charge, Tacoma, Wash. Dec. 31st, 1905.

To expense of the watchmen taking aliens William Holmes and G. W. Kelly (ex. S. S. "Wyneric")

to Dention House at Port Townsend for safekeeping.................................$29.00

Paid above date.

H. S. FULTON,
Immigrant Inspector.

On the 12th day of January, 1906, the "Wyneric" was loaded and ready to take a crew and to proceed to sea. On that date the master, accompanied by J. B. Alexander, British Vice-Consul at the Port of Tacoma, went to the hospital, where an examination was made of the seamen there under treatment, by Drs. McCutcheon and Shug aforesaid, and a certificate was then and there obtained from the said physicians that nine of these men, of whom Hall was one, were unable to proceed to sea on account of sickness. This certificate was in words and figures as follows, the original of which is hereto attached and hereby made a part hereof:

[Certificate of Physicians Dated Jan. 12, 1906.]

Fannie C. Paddock Memorial Hospital,
Chas. McCutcheon, M. D. Superintendent.

Tacoma, Wash., Jany 12, 1906.

This is to certify that the following seamen are unable to proceed to sea on account of sickness:

William Hall, Malaria and Tuberculosis; Geo. Mearns, growth in rectum (may be malignant), and the following from malaria:

Edward Fisher, Patrick McGucie, John Dunn, Ed. Connely, H. Humlen, A. Erickson, H. Sorlye.

CHAS. McCUTCHEON, M. D.,
Surgeon.

F. J. SHUG.

Upon the within and foregoing physicians' certificate, and in accordance with his instructions as vice-consul, and in accordance with the provisions of the British Merchants Shipping Act, the seamen named in the certificate, of whom Hall was one, were then and there discharged from the service of the ship, and became distressed British Seamen in charge of the vice-consul in accordance with the provisions of the British Merchants Shipping Act.

It is stipulated by the parties hereto that the Court may take the Consular instructions aforesaid, and the British Shipping Act, as having been approved, and a part of the record in this cause.

The "Wyneric" departed from the port of Tacoma outward bound on January 13th, 1906, leaving said seaman Hall under treatment at the said hospital as aforesaid. Hall's home from where he shipped on the "Wyneric" was at South Shields, England.

Thereafter, on or about the 25th day of January, 1906, said J. B. Alexander, as British vice-consul and in accordance with the provisions of the British Merchants Shipping Act, as aforesaid, made an arrangement with the master of the British steamship "Craig Hall," bound from the port of Tacoma to South Shields, England, to take the said Hall as one of her crew to the said English port as an ordinary seamen, having obtained from the said Drs. McCutcheon and Shug a certificate that the said Hall was able to serve on the "Craig Hall" as an ordinary seaman. This certificate was in words and figures as follows, the original of which is attached hereto and made a part hereof:

[Certificate of Physicians, Dated January 25, 1906.]

Fannie C. Paddock Memorial Hospital,
Chas. McCutcheon, M. D., Superintendent.

Tacoma, Wash., Jany. 25, 1906.

This is to certify that William Hall, ex-seaman Br. Ship "Wyneric," is able to go on board of the S. S. "Craig Hall," bound for Europe, as an ordinary seaman.

CHAS. McCUTCHEON, Supt.
F. J. SHUG,
A. A. Surgeon, U. S. M. H. S. P. H.

Said Hall refused to ship upon the "Craig Hall" in accordance with the arrangement made by the vice-consul, and as said vice-consul was not entirely satisfied that said Hall's health was sufficiently good at that time to make the voyage, said Hall was allowed to remain in the hospital under treatment.

On the 20th day of January, 1906, said J. B. Alexander, as British vice-counsul, received a communication from the Inspector in Charge of the Immigration Department, in words and figures as follows, the original of which is attached hereto and hereby made a part hereof:

[Letter, Dated Jan. 19, 1906, from Immigrant Inspector to British Vice-Consul.]

DEPARTMENT OF COMMERCE AND LABOR.
IMMIGRATION SERVICE.

Office of Inspector in Charge.

Seattle, Wash., Jan. 19, 1906.

No. 1570.

Hon. J. B. Alexander, British Vice-Consul, Tacoma, Wash.

Sir: I am advised by Inspector Fulton of Tacoma that the British steamship "Wyneric" cleared from Port Townsend, Wash., recently without having aboard alien seaman William Hall, who was certified by the Marine-Hospital Surgeon as suffering from consumption, debarred by Board of Special Inquiry, and ordered deported to the country from whence he came at the expense of the vessel. Inspector Fulton states that notice of deportation was served on the master; that instead of placing alien aboard the vessel, he was brought before you and discharged; and that no arrangements have been made either by yourself or the Captain for the deportation of Mr. Hall.

Will you kindly advise what disposition you intend to make of the alien? He has been regularly debarred by a Board of Special Inquiry on certificate from a Marine Hospital Surgeon, and must be returned to the country from whence he came.

Respectfully,

A. H. GEFFENEY,

Act. Immigrant Inspector in Charge.

On the 29th day of January, 1906, said J. B. Alexander, British vice-consul, replied to the said communication by letter in words and figures as follows, a carbon copy of which letter is hereto attached and hereby made a part hereof:

[Letter Dated Jan. 29, 1906, from British Vice-Consul to Immigrant Inspector.]

British Vice-Consulate,
Tacoma, Washington State.

29th Jany. 1906.

Sir: I have to acknowledge the receipt of Mr. Geffeney's letter of the 19th January, 1906, marked No. 1570, as to the disposition of W. Hall, "O. S." ex "Wyneric," now a patient in the "Memorial" Hospital here, in my charge, who was debarred from entering this country. My delay in not replying earlier was caused by my inability to give you a definite reply.

It was my purpose to return this man to the United Kingdom on the British steamship "Craighall" bound to Europe, in the event of his being in a fit condition to make the voyage. I accordingly got the master to consent to take him, provided he could work, and I provided myself with a medical certificate to this effect and the man was to go on board "Craighall" on the evening of the 25th to commence work on the 26th; however, on the morning of the 26th I found him still in hospital, saying that he was unfit to work; so nothing was done that day.

Again on Saturday the 27th, Hall still declined to go on board, and as he looked very miserable, and as

the master had refused to take him unless he could work, I could not do anything further in the matter, except keep Hall in hospital, where he still is. I am this day informed by the physician that his condition is such that it would be very unwise to place him on board any vessel.

There is nothing more for me to do than to let him remain in hospital until his condition is improved and I can get him on some homeward bound vessel, and I will inform you as soon as I propose to do this, on the physician's certificate.

Re case of Henchley, Apprentice ex "Australia," now a patient, in my care in the "Memorial" Hospital here and also "debarred" from entering this country:

As soon as Henchley is sufficiently recovered and Captain Witt, master of the British ship "Ber muda," is ready to receive him, this apprentice will be sent to join "Bermuda," being owned by the same company to whom the apprentice is "indentured."

I will inform Mr. Fulton when I propose to send Henchley to join "Bermuda." I am,

Yours very respectfully,
JOHN B. ALEXANDER,
British Vice-Consul.

W. P. ESTELL, Esq.,
Immigrant Inspector in Charge, Seattle, Washington, State.

On or about February 14, 1906, the said Alexander, as British vice-consul, acting in accordance with the provisions of the British Merchants Ship-

ping Act aforesaid, made arrangements with Captain Roupe of the British ship "Balmoral," bound from the port of Tacoma to Hull, England, to receive the said seaman Hall on board his ship for passage home as an ordinary seaman, and obtained from the said Drs. McCutcheon and Shug a certificate that Hall was then able to go to sea, and to work as an ordinary seaman, which certificate was in words and figures as follows, the original of which is attached hereto, and hereby made a part hereof.

[Certificate, Feb. 14, 1906, of Physicians.]

Fannie C. Paddock Memorial Hospital,
Chas. McCutcheon, M. D., Superintendent.

Tacoma, Wash., Feb. 14, 1906.

This is to certify that William Hall, ex-seaman Br. Ship "Wyneric," is now able to go to sea, and do work as an ordinary seaman.

CHAS. McCUTCHEON, M. D.,
Supt. of Hospital.
F. J. SHUG.

Hall again refused to ship in accordance with the arrangement made, whereupon, Hall having been discharged and not being a deserter (the vice-consul having no power or authority to cause his arrest or detention), said Alexander, as British vice-consul, verbally made a request to Immigrant Inspector Adams of the Immigration Service, that an Inspector be detailed to take said Hall from the Memorial Hospital and place him on board the ship "Balmoral," in charge of the master, for deportation. He was then informed by the said Immigrant In-

spector that the Immigration Department had no authority so to do, and could not render to said vice-consul any assistance in such cases; whereupon the said vice-consul confirmed his oral request and the reply thereto by a letter in writing to the Immigrant Inspector in charge at Tacoma, in words and figures as follows, a carbon copy of which is attached hereto, and hereby made a part hereof:

[Letter, Dated Feb. 14, 1906, from British Vice-Consul to Immigrant Inspector.]

British Vice-Consulate.

Tacoma, Washington State, U. S. A.

14th February, 1906.

Sir: To confirm my verbal request this morning, made to Mr. Immigrant Inspector Adams, I now beg leave to inform you that I called at the United States Inspector''s office this morning, in company with Captain Roop, Master of the British Barque "Balmoral," and informed the Inspector in Charge that I had provided the British Barque "Balmoral" now ready to sail on the 15th inst. for Hull direct, whereby the ineligible alien seaman William Hall, now a patient in the Memorial Hospital here, could be deported, his home being in South Shields, England, and requested that an Inspector be detailed to take Hall from the Memorial Hospital and place him on board "Balmoral" in charge of the Master for deportation; and I was informed that Immigrant In-

spectors had no authority to do this, and that they could render me no assistance in such cases.

I have the honor to be, Sir,

Yours very respectfully,

J. B. A., British Vice-Consul.

To the Immigrant Inspector in Charge, Tacoma, Washington State.

To this communication said Alexander received a reply from the Immigration Inspector in Charge, in words and figures as follows, the original of which is attached hereto, and hereby made a part hereof.

[Letter, Dated Feb. 17, 1906, from Immigrant Inspector to British Vice-Consul.]

DEPARTMENT OF COMMERCE AND LABOR.
IMMIGRATION SERVICE.

Office of Inspector in Charge, Seattle, Wash.

February 17, 1906.

No. 1570.

Hon. J. B. Alexander, British Vice-Consul, Tacoma, Wash.

Sir: Replying to your letter of the 14th instant addressed to Immigrant Inspector, Tacoma, your attention is called to the fact that the status of this alien, Wm. Hall, is the same as that of an alien seaman debarred landing, and is ashore at the expense and risk of the vessel bringing him and it is not within the province of the Immigrant Inspector to compel this alien to ship as a seaman aboard an outgoing vessel against his will, nor to violate the navigation laws by placing him aboard a ship not licensed to carry passengers from the United States. If ar-

rangements are made to place the alien on an outbound vessel licensed to carry passengers, the Inspectors at Tacoma will be instructed to escort said alien aboard such vessel.

For your information please find enclosed copy of letter dated Feb. 6th, 1906, from Commissioner-General of Immigration, Washington, D. C. which covers the status of this alien fully.

Respectfully,

WM. B. ESTELL,

Immigrant Inspector in Charge.

Copy furnished Immigrant Inspector Fulton, Tacoma.

[Letter, Dated Feb. 6, 1906, from Commissioner General to Immigrant Inspector.]

DEPARTMENT OF COMMERCE AND LABOR.
BUREAU OF IMMIGRATION,
WASHINGTON.

No. 49924. February 6, 1906.

W. B. Estell, Inspector in Charge, Seattle, Wash.

Sir: In relation to the case of William Hall, in regard to whom there has been recent telegraphic correspondence with your office, you are advised that the said alien, although in hospital, having been discharged as an alien and found inadmissible as such by a board of special inquiry, is not, in contemplation of law, within the United States. His landing has been temporary and for the purpose merely of examination. (See Section 16 of the Act of March 3, 1903.) He therefore remains in the custody and at the risk of the master of the vessel by which he was

brought until said master, or the owners of the vessel, remove the said Hall from the United States in accordance with the findings of the board of special inquiry.

From this condition it will be obvious to you that no warrant for his arrest and deportation is required. This situation could be altered only by the escape of the said Hall from the hospital, in which event it would become necessary to issue a warrant, because he would then be found in the United States in violation of law, and not in the custody and under the control of the owners of the vessel by which he was brought, or of any agents of such owners.

As a complete review of this subject, there is enclosed herewith for your information a copy of a letter of even date herewith, addressed to the Secretary of State.

Respectfully,

Incl. 3854 (Signed) F. P. SARGENT,

Commissioner General,

FHL

Seattle, Wash., February 13, 1906.

Press copy respectfully furnished Inspector A. S Fulton, Tacoma, Wash., for his information.

(Signed) WM. B. ESTELL,

Immigrant Inspector in Charge.

AGH

To this communication of the Immigration Department said Alexander replied by letter in words and figures as follows a carbon copy of which letter is hereto attached and hereby made a part hereof:

[Letter, Dated Feb. 28, 1906, from British Vice-Consul to Immigrant Inspector.]

British Vice-Consulate,

Tacoma, Washington State, 28th Feb. 1906.

Sir: I have to acknowledge the receipt of your letter of the 17th February, 1906, marked No. 1570 re O. S. Wm. Hall, containing enclosed copy of letter from the Commissioner General Immigration, for which I beg leave to thank you.

I wish now to advise you that after offering Wm. Hall employment as O. S. on various vessels leaving this port homeward bound, which he has declined to accept, as well as to on board any of these vessels, now, in accordance with my Consular Instructions, have advised the Superintendent of the "Memorial" Hospital at this port that after the 28th day of February, 1906, I shall cease to afford relief for seaman Hall, who now forfeits all claim to be sent home, and ask that he be discharged from the "Memorial Hospital."

I am,

Yours very respectfully,

J. B. A.,

British Vice-Consul.

To the U. S. Immigrant Inspector in Charge, Immigrant Inspector's Office, Tacoma, Washington State.

On February 27, 1906, said Alexander, as British vice-consul, notified the authorities of the said hospital that no further relief would be extended to the

said seaman Hall, which notification was in words and figures as follows, a carbon copy of which is hereto attached, and hereby made a part hereof:

[Letter, Dated Feb. 27, 1906, from British Vice-Consul to Doctor McCutcheon.]

British Vice-Consulate,
Tacoma, Washington State,
27th February, 1906.

Dear Sir: Acting on your letter to me of the 14th of February, 1906, concurred in by Dr. Schug, saying that William Hall, O. S. ex "Wyneric," was able to go to sea and do work as an O. S., I have offered Hall employment as an O. S. on various vessels bound home, and he has declined to accept such employment or go on board any of these vessels. I am now directed by Mr. Consul Laidlaw at Portland, in accordance with my Consular instructions, to advise you that after the 28th of February, 1906, I shall cease to afford relief for seaman Hall, who now forfeits all claim to be sent home and ask that he be discharged from the "Memorial" Hospital.

I am,
Yours very respectfully,
J. B. A.,
British Vice-Consul.

Dr. Chas. McCutcheon, M. D., Supt. Memorial Hospital, Tacoma, Washington State.

On the evening of February 28th, 1906, the said seaman Hall left the said hospital, and has not since been seen or heard of either by the master of the

"Wyneric," the British vice-consul, or any of the officers of the Immigration Department.

The British ship "Wyneric," returned to Puget Sound in April, 1906, and her master, Niven, was arrested upon the information filed in the case at bar.

The British vice-consul, in accordance with the provisions of the British Merchants Shipping Act as aforesaid, and with the regulations of the British Board of Trade, made and filed an account of its transactions in the matter of the said Hall, which account was in words and figures as follows, a copy of which is hereto attached, and hereby made a part hereof:

[Account of British Vice-Consul Dated Feb. 28, 1906.]

C 13 C. C. 7.

Account of Wages received and Expenses incurred by British Vice-Consul at the Port of Tacoma for a Seaman who has recovered, showing the balance, if any, which has been paid to him on his getting employment.

Name of Seaman: Wm. Hall, 18 "O. S.", South Shields.

Name and official number of ship from which landed, and Port of Registry: "Wyneric" 104, 572, Glascow.

Date when taken charge of by officer: Jan. 13, 1906.

Date when discharged out of Officer's care: 28th February, 1906.

Amount of wages received in cash from the Master and credited in account current with the Board of Trade for the Quarter ended March 31, 1906....................$59.30

Amount paid for subsistence, etc., and charged in account current with the Board of Trade for the Quarter ended March 31, 1906 ....$52.00

Balance due seaman........................ 7.30

JOHN B. ALEXANDER,
British Vice-Consul.

Seaman refuses to accept employment, further relief refused and this balance not paid seaman this 28th day of Feby. 1906.

It is understood that in entering into this stipulation the Government does not admit that the British Merchants Shipping Act and the doings of the British Consuls thereunder are relevant to the determination of this issue.

Dated this 15th day of January, 1908.

ELMER E. TODD,
United States Attorney.

CHARLES T. HUTSON,
Assistant United States Attorney.

JAMES M. ASHTON,
Attorney for the Defendant.

[Notice, Dated December 27, 1905, from Immigration Inspector to Master of Steamship.]

DEPARTMENT OF COMMERCE AND LABOR.
IMMIGRATION SERVICE.

Office of the Inspector in Charge,

Seattle, Wash., Dec. 27, '05.

To the Master of the S. S. Wyneric.

Sir: Section 18 of the Act approved March 3, 1903, reads:

"That it shall be the duty of the owners, officers and agents of any vessel bringing an alien to the United States to adopt due precautions to prevent the landing of any such alien from such vessel at any time and place other than that designated by the Immigration Officers, and any such owner, agent, officer, or person in charge of such vessel, who shall land or permit to land any alien at any other time and place than that designated by the Immigration officers shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be punished by a fine for each alien so permitted to land of not less than One Hundred or more than One Thousand Dollars, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment, and every such alien so landed shall be deemed to be unlawfully in the U. S. and shall be deported as provided by law."

In pursuance of the foregoing act of Congress, you are hereby directed to prevent the landing of the alien (s) listed below until his right to do so has been

determined by a duly qualified Immigration Officer, or Immigration Officers.

Rule 13, Immigration Regulations, dated August 26, 1903, provide:

That at least twenty-four hours in advance of the intended time of sailing, the master, agent, owner, or consignee of any vessel, shall notify the Immigration office at the port of departure. You are, therefore, hereby notified, that such report should be made, either in person, by telephone, or otherwise, twenty-four hours prior to the departure of your vessel. Immigration office telephone is Main 644.

UNITED STATES IMMIGRATION INSPECTOR IN CHARGE.

Per H. H. ADAMS,
Immigrant Inspector.

Service hereby acknowledged:

WM. HALL.
WM. HOLMES.
G. W. KELLY.
I. YOUNG.

[Letter, Dated December 28, 1905, from Master of Steamship to Immigrant Inspector.]

Copy. "Wyneric," Tacoma. Dec. 28th, 1905.

Mr. Alexander S. Fulton, U. S. Immigrant Inspector, Tacoma.

Dear Sir: I beg to request that you want me permission to discharge the following men from the British Steamer "Wyneric," who are not in a condition to fulfill their duties on the intended voyage: J. W. Kelly, W. Holmes, W. Hall.

Yours respectfully,
(Signed) P. G. NIVEN,
Master S. S. "Wyneric."

[Notice, Dated December 30, 1905, from Office of Commissioner of Immigration to Owner of Steamship.]

OFFICE OF U. S. COMMISSIONER OF IMMIGRATION.

Port of Tacoma, Wash.

December 30, 1905.

To the Owners of S. S. Wyneric, in Port, Tacoma, Wash.

Sirs: You are hereby notified that the aliens hereinafter named, who reached this port on the above-named vessel on Dec. 26th, 1905, have, for the reasons stated below, been duly excluded from admission into the United States, and you are therefore required to return them to the port from which they came.

Wm. Holmes, Blindness right eye. L. P. C.

G. W. Kelly, Tertiary syphilis. L. D.

Wm. Hall, Consumptive tendency. L. P. C.

Service hereby acknowledged, Dec. 30, 1905, 11:40 A. M.

Master S. S. "WYNERIC."

A. H. GEFFENY,

Acting Inspector in Charge.

Per A. S. FULTON,

Immigrant Inspector.

[Certificate of Doctor Shug, Dated Dec. 26, 1905.]

DEPARTMENT OF COMMERCE AND LABOR.
IMMIGRATION SERVICE.
MEDICAL DIVISION.

Port of Tacoma, Wash., Dec. 26, 1905.

Name, Wm. Hall.
Nat., England, Race, White.
S. S. Wyneric.
Arrived Dec. 26, 1905.

This is to certify that the above described immigrant has consumptive tendency very marked, affecting ability to earn a living.

F. J. SHUG,
Surgeon P. H. and M. H. S. in Chicago.

To the Commissioner of Immigration.

[Account of Immigrant Inspector, Dated December 31, 1905.]

DEPARTMENT OF COMMERCE AND LABOR.
IMMIGRATION SERVICE.

Office of Inspector in Charge.

Tacoma, Wash., Dec. 31st, 1905.

To expense of two Watchmen taking aliens William Holmes, and G. W. Kelly (ex S. S. "Wyneric") to Detention House at Port Townsend for safekeeping $29.00

Paid above date.

A. S. FULTON,
Immigrant Inspector. E.

[Account of Immigrant Inspector, Dated Jan. 17, 1906.]

DEPARTMENT OF COMMERCE AND LABOR
IMMIGRATION SERVICE.

Officer of Inspector in Charge,
Seattle, Wash.

Port Townsend, Wash. Jan. 17, 1906.

British Steamer "Wyneric" to United States Detention House, Dr.

1906

Jan. 1-17. For maintenance of aliens Wm. Holmes and G. W. Kelly ex above vessel..$23.00

Received payment:

O. P. ROBINSON,
Immigrant Inspector.

[Certificate of Physician, Dated Jan. 12, 1906.]

Fannie C. Paddock Memorial Hospital.
Chas. McCutcheon, M. D., Superintendent.

(6) Tacoma, Wash., Jany. 12, 1906.

This is to certify that the following seamen are unable to proceed to sea on account of sickness:

William Hall, Malaria and tuberculosis

George Mearns, Growth in rectum (may be malignant); and the following from malaria:

Edward Fisher, Patrick McGucie, John Dunn, Ed. Connelly, H. Humlen, A. Erickson, H. Sorlye.

[Seal] CHAS. B. McCUTCHEON, M. D.,
Supt.

F. H. SHUG,
U. S. Surgeon, P. H. and M. H. S.

[Certificate of Physician, Dated Jan. 25, 1906.]

Fannie C. Paddock Memorial Hospital,
Chas. McCutcheon, M. D., Superintendent.

(7) Tacoma, Wash., Jany. 25, 1906.

This is to certify that William Hall, Ex-seaman Br. Ship "Wyneric," is able to go board of the S. S. "Craighall" bound for Europe, as an ordinary seaman.

CHAS. McCUTCHEON, M. D.,
Supt.
F. J. SHUG,
A. A. Surgeon, U. S. M. H. S. P. H.

No. 1. J. B. A. To be returned.

[Certificate of Physician, Dated Feb. 14, 1906.]

Fannie C. Paddock Memorial Hospital,
Chas. McCutcheon, M. D., Superintendent.

(10) Tacoma, Wash., Feb. 14, 1906.

This is to certify that William Hall, Ex-seaman Br. Ship "Wyneric" is now able to go to sea and do work as an ordinary seaman.

CHAS. McCUTCHEON, M. D.,
Supt. of Hospital.
F. H. SHUG,
A. A. Surgeon, U. S. P. H. & M. H. S.

No. 2, J. B. A., To be returned.

[Letter, Dated Feb. 14, 1906, from British Vice-Consul to Immigrant Inspector.]

British Vice-Consulate,
Tacoma, Washington State, U. S. A.

(11) 14th February, 1906.

To confirm my verbal request this morning, made to Mr. Immigrant Inspector Adams, I now beg leave to inform you that I called at the United States Immigrant Inspector's office this morning, in company with Captain Roop, Master of the British Barque "Balmoral," and informed the Inspector in charge that I had provided the British Barque, "Balmoral," now ready to sail on the 15th inst., for Hull direct, whereby the inelegible alien seaman William Hall, now a patient in the "Memorial" Hospital here, could be deported, his home being in South Shields, England, and requested that an Inspector be detailed to take Hall from the "Memorial" Hospital and place him on board "Balmoral" in charge of the Master for deportation; and I was informed that Immigrant Inspectors had no authority to do this and that they could render me no assistance in such cases.

I have the honour to be, Sir,

Yours very respectfully,
J. B. A., British Vice-Consul.

To the Immigrant Inspector in Charge, Tacoma, Washington State.

[Letter, Dated Feb. 17, 1906, from Immigrant Inspector to British Vice-Consul.]

DEPARTMENT OF COMMERCE AND LABOR
(12) IMMIGRATION SERVICE.

No. 1570. Office of Inspector in Charge,
Seattle, Wash.

February 17, 1906.
Rec. Feb. 19, 1906.

Hon. J. B. Alexander, British Vice-Consul, Tacoma, Wash.

Sir: Replying to your letter of the 14th instant addressed to Immigrant Inspector, Tacoma, your attention is called to the fact that the status of this alien, Wm. Hall, is the same as that of an alien seaman debarred landing and is ashore at the expense and risk of the vessel bringing him, and it is not within the province of the Immigrant Inspector to compel this alien to ship as a seaman aboard an outgoing vessel against his will, nor to violate the Navigation laws by placing him aboard a ship not licensed to carry passengers from the United States. If arrangements are made to place the alien on an outbound vessel licensed to carry passengers, the Inspectors at Tacoma will be instructed to escort said alien aboard such vesel.

For your information please find enclosed copy of letter dated Feb. 6th, 1906, from Commissioner-Gen-

eral of Immigration, Washington, D. C., which covers the status of this alien fully.

Respectfully,
WM. B. ESTELL,
Immigrant Inspector in Charge.
A. H. G.

Copy furnished Immigrant Inspector, Fulton, Tacoma.

[Letter, Dated Feb. 6, 1906, from Commissioner-General to Immigrant Inspector.]

DEPARTMENT OF COMMERCE AND LABOR
BUREAU OF IMMIGRATION.
WASHINGTON.

No. 49924.

February 6, 1906.

W. B. Estell, Inspector in Charge, Seattle, Wash.

Sir: In relation to the case of William Hall, in regard to whom there has been recent telegraphic correspondence with your office, you are advised that the said alien, although in hospital, having been discharged as an alien and found inadmissible as such by a board of special inquiry, is not, in contemplation of law, within the United States. His landing has been temporary and for the purpose merely of examination. (See section 16 of the Act of March 3, 1903.) He therefore remains in the custody and at the risk of the master of the vessel by which he was brought until said Master, or the owners of the vessel, remove the said Hall from the United States in accordance with the findings of the board of special inquiry.

From this condition it will be obvious to you that no warrant for his arrest and deportation is required. This situation could be altered only by the escape of the said Hall from the hospital, in which event it would become necessary to issue a warrant, because he would then be found in the United States in violation of law, and not in the custody and under the control of the owners of the vessel by which he was brought, or of any agents of such owners.

As a complete review of this subject, there is enclosed herewith for your information a copy of a letter of even date herewith, addressed to the Secretary of State.

Respectfully,
(Signed) F. P. SARGENT.
Commissioner-General.

Incl. 3854. FHL.

Seattle, Wash., February 13, 1906.

Press copy respectfully furnished Inspector A. S. Fulton, Tacoma, Wash., for his information.

(Signed) WM. B. ESTELL,
Immigrant Inspector in Charge.
AHG.

Copies of Letters re Wm. Hall, "Debarred Alien Seaman ex "Wyneric."

[Letter, Dated Feb. 28, 1906, from British Vice-Consul to Immigrant Inspector.]

British Vice-Consulate,
Tacoma, Washington State, 28th February, 1906.

Sir: I have to acknowledge the receipt of your letter of the 17th February, 1906, marked No. 1570,

re "O. S." Wm. Hall, containing enclosed copy of letters from the Commissioner-General of Immigration, for which I beg leave to thank you.

I wish now to advise you, that after offering Wm. Hall employment as O. S. on various vessels leaving this port homeward bound, which he has declined to accept, as well as go on board any of these vessels, now, in accordance with my Consular Instructions, have advised the Superintendent of the "Memorial" hospital at this port, that after the 28th day of February, 1906, I shall cease to afford relief for seaman Hall, who now forfeits all claim to be sent home, and ask that he be discharged from the "Memorial" hospital. I am,

Yours very respectfully,
J. B. A., British Vice-Consul.

To the U. S. Immigrant Inspector in Charge, Immigrant Inspector's Office, Tacoma, Washington State.

[Letter, Dated Feb. 27, 1906, from British Vice-Consul to Doctor McCutcheon.]

British Vice-Consulate,
(14) Tacoma, Washington State,
27th February, 1906.

Dear Sir: Acting on your letter to me of the 14th of February, 1906, concurred in by Dr. Schug, saying that William Hall, "O. S." ex "Wyneric," was able to go to sea and do work as an "O. S.," I have offered Hall employment as an "O. S." on various vessels bound home, and he has declined to accept such employment or go on board any of these ves-

sels. I am now directed by Mr. Consul Laidlaw at Portland, in accordance with my "Consular Instructions," to advise you, that after the 28th day of February, 1906, I shall cease to afford relief for seaman Hall, who now forfeits all claim to be sent home, and ask that he be discharged from the "Memorial" hospital. I am,

Yours very respectfully,
J. B. A., British Vice-Consul.

Dr. Chas. McCutcheon, M. D., Supt. "Memorial" Hospital, Tacoma, Washington State.

[Account of British Vice-Consul, Dated Feb. 28, 1906.]

C. 13. C. C. 7. Copy.

Account of Wages received and Expenses incurred by British Vice-Consul at the Port of Tacoma, Washington, U. S. A., for a Seaman who has recovered, showing the balance, if any, which has been paid to him on his getting employment.

Name of Seaman.	Name and Official Number of Ship from which landed, and Port of Registry.	Date when Taken Charge of by Officer.
Wm. Hall 18 "O. S."	"Wyneric" 104,572	Jan. 13, 1906.
South Shields	Glasgow.	

Date when discharged out of Officer's care.

28th February, 1906.

Receipts	Currency
Amount of wages received in cash from the master and credited in account current with the Board of Trade for the Quarter ended March 31, 1906....................	$59.30

Disbursements		Currency
Amount paid for subsistence, etc., and charged in account current with the Board of Trade for the Quarter ended Mar. 31, 1906......	$52.00	52.00
Balance due to Seaman...... .		7.30

JOHN B. ALEXANDER, Signature
and Title
British Vice-Consul of Officer.

Seaman refusing to accept employment, further relief refused and this balance not paid Seaman, this 28th day of February, 1906.

[Letter, Dated Jan. 19, 1906, of Immigrant Inspector to British Vice-Consul.]

DEPARTMENT OF COMMERCE AND LABOR
IMMIGRATION SERVICE

Office of Inspector in Charge,
Seattle, Wash., January 19, 1906.

Re Wm. Hall ex "Wyneric" and Henchley ex "Australia."

Important Reference.

Ex. Mr. Consul Laidlaw's Despatches No. 4, 5, and 7.
No. 1570.

Hon. J. B. Alexander, British Vice-Consul, Tacoma, Wash.

Sir: I am advised by Inspector Fulton of Tacoma that the British Steamship "Wyneric" cleared from Port Townsend, Wash., recently without having aboard alien seaman William Hall, who was certified by the Marine-Hospital Surgeon as suffering

from consumption, debarred by Board of Special Inquiry, and ordered deported to the country from whence he came at the expense of the vessel. Inspector Fulton states that notice of deportation was served on the master; that instead of placing alien aboard the vessel he was brought before you and discharged; and that no arrangements have been made either by yourself or the Captain for the deportation of Mr. Hall.

Will you kindly advise what disposition you intend to make of the alien. He has been regularly debarred by a Board of Special Inquiry on certification from a Marine-Hospital Surgeon and must be returned to the country from whence he came.

Respectfully,

A. H. GEFFENEY,

Acting Immigrant Inspector in Charge.

[Letter, Dated Jan. 29, 1906, from British Vice-Consul to Immigrant Inspector.]

British Vice-Consulate,

Tacoma, Washington State.

(9) 29th Jany. 1906.

Sir: I have to acknowledge the receipt of Mr. Geffeney's letter of the 19th January, 1906, marked No. 1570, as to the disposition of W. Hall, "O. S." ex "Wyneric," now a patient in the "Memorial" Hospital here, in my charge, who was "debarred" from entering this country; my delay in not replying earlier was caused by my inability to give you a definite reply.

It was my purpose to return this man to the United Kingdom on the British steamship "Craighall" bound to Europe, in the event of his being in a fit condition to make the voyage. I accordingly got the Master to consent to take him, provided he could work, and I provided myself with a medical Certificate to this effect and the man was to go on board "Craighall" on the evening of the 25th to commence work on the 26th; however, on the morning of the 26th I found him still in hospital, saying that he was unfit to work; so nothing was done that day; again on Saturday, the 27th, Hall still declined to go on board, and as he looked very miserable and as the Master had refused to take him unless he could work, I could not do anything in the matter, except keep Hall in Hospital, where he still is. I am this day informed by the physician that his condition is such that it would be very unwise to place him on board any vessel.

There is nothing more for me to do than to let him remain in hospital until his condition is improved and I can get him on some homeward bound vessel, and I will inform you as soon as I propose to do this, on the physician's certificate.

Re case of Henchley, apprentice ex. "Australia," now a patient, in my care, in the "Memorial" Hospital here and also "debarred" from entering this country.

As soon as Henchley is sufficiently recovered and Captain Witt, Master of the British Ship "Bermuda" is ready to receive him; this Apprentice will be sent to join "Bermuda," being owned by the

same Company to whom the apprentice is "indentured." I will inform Mr. Fulton when I propose to send Henchley to join "Bermuda."

I am,

Yours very respectfully,

JOHN B. ALEXANDER,

British Vice-Consul.

W. P. Estell, Esq., Immigrant Inspector in Charge,
Seattle, Washington State.

[List, Dated Oct. 11, 1905, of Vessels Entered and Cleared.]

October 11th, 1905.

September 1st to October 10th, 1905.

Entered.

Bark Br. "Beechbank"	Antwerp	2154	Cargo
Ship Br. "Helensburgh"	Leith	1628	Cargo
Str. Br. "Freeman"	Yokohama	5727	Cargo
Str. Br. "Copac"	Quayaquil	1951	Cargo
Sch. Am. "Alex. T. Brown"	Manila	654	Ballast
Str. Br. "Machaon"	Yokohama	4276	Cargo
Str. Jap. "Tyo Maru"	Yokohama	3918	Cargo
Str. Nor. "Tiger"	Hong Kong	2195	Ballast

Cleared.

Str. Br. "Wyneric"	Panama	3263	Cargo
Str. Am. "Shawmut"	Yokohama	6195	Cargo
Str. Am. "Dakota"	Yokohama	13305	Cargo
Str. Br. "Henley"	Panama	2111	Cargo
Str. Jap. "Tyo Maru"	Yokohama	3918	Cargo
Bk. Br. "California"	Belfast	2461	Cargo

W. H. MURRAY.

J. B. ALEXANDER,
British Vice-Consul, Tacoma.

[Endorsed]: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington. Jany. 15, 1908. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

[Order Submitting Cause on Stipulated Facts.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3248.

UNITED STATES

vs.

P. G. NIVEN.

Now on this day, upon consent of parties, it is ordered this cause be, and the same is submitted upon stipulated facts. Counsel are allowed ten days from this day in which to file brief.

Entered in Vol. 1, General Order Book, U. S. District Court, at page 391.

United States District Court, Western District of Washington, Northern Division.

No. 3248.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

P. G. NIVEN,

Defendant.

Memorandum Decision on the Merits.

Filed June 22, 1908.

In the month of December, 1905, the steamship "Wyneric," of which the defendant was master, ar-

rived at Tacoma from Panama, having as a member of her crew an alien seaman named Hall, who together with other members of the crew were taken to a hospital in Tacoma, being then sick with malarial fever. After examination by physicians, a surgeon of the marine hospital services certified that Hall had "Consumptive tendency, very marked, affecting his ability to earn a living." Thereupon officers of the Immigration service served upon the defendant a notice containing a quotation of Section 18 of the Act of Congress, approved March 3, 1903, entitled "An Act to Regulate the Immigration of Aliens into the United States," and requiring him in pursuance with that statute to prevent the landing of Hall until his right to do so had been determined by the qualified immigration officer. Thereafter the defendant requested permission to discharge Hall from the service of the vessel on the ground that he was not in a condition to perform his duties as a seaman, and after further examination, the defendant was notified that by reason of Hall's consumptive tendency, he had been excluded from admission to the United States, and that the defendant was required to return him to the port from whence he came. After a subsequent examination from which it again appeared that Hall was unable to go to sea on account of sickness, he was by the defendant and a British vice-consul discharged and left in the hospital in charge of the vice-consul as a distressed British seaman, and the vessel proceeded on a voyage without him, and without any other provision for returning him to his own country having been made. The

vice-consul made two attempts to send the man away on British vessels as an ordinary seaman, but he refused to engage himself in that capacity on account of his physical disability, and after the second refusal the vice-consul notified the Superintendent of the Hospital that he would cease to afford relief—Hall having forfeited all claim to be sent home. He was then discharged from the hospital and disappeared.

Upon the foregoing state of facts, the defendant was charged by an information filed against him with a misdemeanor as defined by Sections 18, 19 and 20 of the Act of Congress above referred to, and by stipulation the case has been submitted to the Court for determination without a jury.

It is the opinion of the Court that as Hall was afflicted with a contagious disease at the time of his arrival in this country, he belonged to the class of aliens excluded from entering the United States by the terms of said Act of Congress, that he was rightfully denied admission by the immigration officers, that his admission to a hospital for treatment did not change his status as an alien seaman in the service of the vessel. That is to say, he was not admitted to this country by permission of the immigration officers so as to releave the defendant of the obligation to detain him and take him away, and that by abandoning him without providing for his removal, the defendant intentionally violated Section 18 of said Act of Congress, which provides as follows:

"Sec. 18. That it shall be the duty of the owners, officers and agents of any vessel bringing an alien to the United States to adopt due precautions to prevent the landing of any such alien from such vessel at any time or place other than that designated by the immigration officers, and any such owner, officer, agent, or person in charge of such vessel who shall land or permit to land any alien at any time or place other than that designated by the immigration officers, shall be deemed guilty of a misdemeanor, and shall on conviction be punished by a fine for each alien so permitted to land of not less than one hundred nor more than one thousand dollars, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment, and every such alien so landed shall be deemed to be unlawfully in the United States and shall be deported, as provided by law."

In its opinion in the case of Taylor vs. United States, 207 U. S. 120, the Supreme Court said: "we assume for purposes of decision that one who makes it possible for an alien to land, by omitting due precaution to prevent it, permits him to land within meaning of the penal clause in Section 18." The manifest intention of the defendant to rid his vessel of the burden of a diseased and infirm seaman and his utter disregard of the obligations imposed by law, was culpable, and distinguishes this case from the Taylor case.

The Court, therefore, finds the defendant guilty as charged in the information against him, and it is the

sentence of the Court that he pay the United States a fine of $100.00 and costs.

C. H. HANFORD,
Judge.

[Endorsed]: Memorandum Decision on the Merits. Filed in the U. S. District Court, Western Dist. of Washington. Jun. 22, 1908. R. M. Hopkins, Clerk. W. D. Covington, Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 3248.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

P. G. NIVEN,
Defendant.

Decree.

Information having been filed on the 19th day of April, 1906, in the above-entitled court against the defendant P. G. Niven, master of the steamship "Wyneric," charging him with a misdemeanor as defined by sections eighteen, nineteen and twenty of the Act of Congress approved March 3, 1903, entitled "An Act to regulate the immigration of aliens into the United States," and defendant having personally appeared in open court on the 21st day of April, 1906, and entered a plea of not guilty, and the said cause having been submitted by stipulation on the 10th day of February, 1908, Charles T. Hutson, As-

sistant United States Attorney, appearing on behalf of the United States, and James M. Ashton, appearing on behalf of the defendant, wherein said case was submitted to the Court for determination without a jury, said jury being expressly waived, and the Court having examined into the evidence submitted, and having read briefs of counsel, and being fully advised in the premises, rendered its decision on the 22d day of June, 1908, finding the defendant, P. G. Niven, guilty as charged in the information filed against him.

It is, therefore, ordered and decreed, that the defendant, P. G. Niven, be and he is hereby adjudged guilty as charged in the information filed against him in this cause, and that he pay to the United States a fine of one hundred dollars ($100.00) and costs.

Done this 26th day of October, 1908.

C. H. HANFORD,
Judge.

[Endorsed]: Decree. Filed Oct. 26, 1908. R. M. Hopkins, Clerk.

In the United States District Court, Western District of Washington, Northern Division.

No. 3248.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

P. G. NIVEN,
Defendant.

Petition for Writ of Error and Supersedeas [and Order Thereon].

To the Honorable, the District Court of the United States, for the Western District of Washington, Northern Division, and to the Honorable CORNELIUS H. HANFORD, Judge of Said Court:

Comes now the above-named defendant, P. G. Niven, by his attorney and complains that in the record and proceedings had in this case, and in the rendition of judgment herein in the United States District Court for the Western District of Washington, Northern Division, manifest error hath happened to the great damage of said defendant, which error is more particularly set forth in certain Assignments of Error accompanying this petition and filed herewith.

Wherefore, said defendant P. G. Niven, hereby prays for the allowance of a Writ of Error herein, and that as a supersedeas the said defendant, upon paying the costs of this Court and the United States Circuit Court of Appeals pertaining to the prosecution of said Writ of Error, shall have execution and further proceedings stayed herein pending the determination of such appeal, upon the said defendant allowing to remain in the treasury of this Court the sum of Three Hundred Dollars ($300.00) heretofore deposited by said defendant and now remaining in the Treasury of the Court; and the defendant here prays for such other orders and process as may cause the decision and judgment herein to be cor-

rected by the United States Circuit Court of Appeals for the Ninth Circuit.

P. G. NIVEN,
Defendant and Plaintiff in Error.
By JAMES M. ASHTON,
Attorney for Said Defendant and Plaintiff in Error.

Order.

Upon motion of James M. Ashton, Esquire, attorney for defendant, and upon filing the foregoing petition for a Writ of Error herein, and the Assignment of Errors hereunto annexed, it is hereby ordered that a writ of error be, and hereby is allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the sentence and judgment theretofore entered herein pursuant thereto, and that so long as the defendant permits to remain in the treasury of this Court the sum of Three Hundred Dollars ($300.00) now deposited by him in said treasury and keeps paid the costs and expenses pertaining to the prosecution of said Writ of Error, that execution and any further proceedings herein, excepting those pertaining to the said Writ of Error, be stayed until the determination of all matters to be reviewed under said writ.

Dated, October 30th, 1908.

C. H. HANFORD,
Judge of the United States District Court for the Western District of Washington, Northern Division, and one of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States District Court, Western District of Washington, Northern Division.

No. 3248.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

P. G. NIVEN,

Defendant.

Assignment of Errors.

Comes now the defendant and files the following assignment of errors upon which he will rely in the prosecution of the Writ of Error in this cause.

FIRST.

The United States District Court for the Western District of Washington, Northern Division, erred in holding that the seaman, William Hall, mentioned in the information herein was an alien within the meaning of that term as used in sections eighteen, nineteen and twenty, or either of said sections as contained in the Act of Congress entitled "An Act to Regulate the Immigration of Aliens into the United States," approved March 3d, 1903.

SECOND.

The said United States District Court erred in holding that said William Hall was rightfully denied admission into the United States by the Immigration Officers of the United States.

THIRD.

The said District Court erred in holding and find-

ing that the defendant herein, P. G. Niven, had violated section eighteen of said Act.

FOURTH.

The aforesaid District Court erred in holding that the defendant P. G. Niven had violated the said Act in any respect or to any extent.

FIFTH.

Error of the United States District Court for the Western District of Washington, Northern Division, in finding the defendant guilty as charged in the information against him.

SIXTH.

Error of the said United States District Court in passing sentence upon the defendant to the effect that he pay the United States a fine of One Hundred Dollars ($100.00) and costs.

SEVENTH.

Error of the United States District Court for the Western District of Washington, Northern Division, in entering judgment against the defendant for the amount of said fine of One Hundred Dollars ($100.00) and costs, and that execution be issued therefor, which judgment was rendered and entered herein on the 26th day of October, 1908, and defendant here respectfully alleges that said judgment is contrary to law.

Wherefore, the said defendant, as plaintiff in error herein prays that the aforesaid judgment of the said Court be reversed and that defendant be held not guilty of the misdemeanors or other offenses with which he is charged in the information herein, and

that defendant go hence without day, and that the cash bond or security heretofore deposited by him in the treasury of said Court and now remaining in the treasury of said Court, be returned to the said defendant, his attorney or agent, and that defendant may recover so much of his costs and disbursements herein as he may be entitled to recover, if so held not guilty, and for such other relief as defendant may be entitled to receive.

P. G. NIVEN,
Defendant and Plaintiff in Error.
By JAMES M. ASHTON,
Attorney for said Defendant and Plaintiff in Error.

Due service of the within and foregoing petition, writ and order by the receipt of a true copy thereof hereby is admitted in behalf of all parties entitled to such service by law or by rules of court, this 30th day of October, 1908.

CHARLES T. HUTSON,
Asst. United States Atty.

[Endorsed]: Petition for Writ of Error, Assignment of Errors, and Allowance of Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 30, 1908. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

Writ of Error [Copy].

UNITED STATES OF AMERICA,—ss.

The President of the United States to the Honorable, the Judge of the District Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because, in the record and proceedings as also in the rendition of a judgment in the United States District Court for the Western District of Washington, Northern Division, in the case of the United States of America, plaintiff, vs. P. G. Niven, defendant, and in which the said P. G. Niven as such defendant is now the plaintiff in error herein, a manifest error hath happened, to the great damage of the said P. G. Niven, plaintiff in error, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at the city of San Francisco in the State of California on the 28th day of November next, in the said Circuit Court of Appeals to be then and there held, and that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be

done therein to correct the error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, the 30th day of October, 1908.

[Seal] R. M. HOPKINS,

Clerk of the United States District Court for the Western District of Washington, Northern Division.

Allowed by:

C. H. HANFORD,

District Judge.

Service of the within and foregoing Writ of Error and receipt of a copy thereof is hereby admitted, this 30th day of October, 1908.

ELMER E. TODD,

United States Attorney,

By CHARLES T. HUTSON,

Assistant United States Attorney.

[Endorsed]: Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 30, 1908. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

In the United States District Court, Western District of Washington, Northern Division.

No. 3248.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

P. G. NIVEN,

Defendant.

Notice [of Allowance of Writ of Error, etc.].

To the United States of America:

Notice is hereby given that a Writ of Error has this day been allowed appealing and removing for review this case to the United States Circuit Court of Appeals for the Ninth Circuit, to which court this case is hereby and by virtue of said writ appealed and removed, and all further proceedings herein have been by order duly stayed.

Dated October 30th, 1908.

JAMES M. ASHTON,
Attorney for Defendant and Plaintiff in Error.

Received copy of above notice this 30th Oct/08.

ELMER E. TODD,
U. S. Atty.
By CHARLES T. HUTSON,
Asst. U. S. Atty.

[Endorsed]: Notice. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 30, 1908. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

[Citation on Writ of Error (Copy).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the United States of America and to the United States Attorney for the Western District of Washington, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San

Francisco, in the State of California, within thirty days from the date of this Writ, pursuant to the Writ of Error filed in the office of the Clerk of the United States District Court for the Western District of Washington, Northern Division, wherein P. G. Niven is plaintiff in error and the United States of America is defendant in error, to show cause if any there be, why the judgment in the said Writ of Error mentioned should not be corrected, and speedy justice should not be done to the party in that behalf.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States of America, this 30th day of October, 1908, and of the Independence of the United States the 133d.

[Seal] C. H. HANFORD,

United States District Judge for the Western District of Washington, Northern Division.

Attest: R. M. HOPKINS,

Clerk.

Due and lawful service of the within and foregoing citation and receipt of the copy thereof is hereby admitted this 30th day of October, A. D. 1908.

UNITED STATES OF AMERICA,

By ELMER E. TODD,

United States Attorney for the Western District of Washington, appearing for and representing the United States in the Writ of Error and case mentioned in the foregoing citation.

By CHARLES T. HUTSON,

Asst. U. S. Atty.

[Endorsed]: Citation. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 30, 1908. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

United States District Court for the Western District of Washington.

No. 3248.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

P. G. NIVEN.

Defendant.

Praecipe [for Transcript of Record].

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the entire Record herein for the Court of Appeals, pursuant to Writ of Error allowed on this date.

October 30th, 1908.

JAMES M. ASHTON,
Attorney for Defendant.

[Endorsed]: Praecipe Transcript. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 30, 1908. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3248.

UNITED STATES OF AMERICA,

Defendant in Error,

vs.

P. G. NIVEN,

Plaintiff in Error.

Clerk's Certificate [to Transcript of Record].

United States of America,
Western District of Washington,—ss.

I, R. M. Hopkins, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify the foregoing sixty-five (65) typewritten pages, numbered from 1 to 65, inclusive, to be a full, true and correct copy of the record and proceedings in the above and foregoing entitled cause as the same remain of record and on file in the office of the Clerk of the said court, as I am required to certify and transmit as the record on appeal from the order, judgment and decree of the District Court of the United States for the Western District of Washington, and as the return to the annexed Writ of Error, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California; and that the foregoing record constitutes the Record on appeal and return to said annexed Writ of Error.

I further certify that I annex hereto and herewith transmit the Original Citation and Writ of Error.

I further certify that the cost of preparing and certifying the foregoing record on appeal and return to Writ of Error is the sum of $43.90, and that the said sum has been paid to me by James H. Ashton, Esquire, Attorneys for Defendant and Plaintiff in Error.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Seattle, in said district, this 23d day of November, 1908.

[Seal] R. M. HOPKINS,

Clerk.

Writ of Error [Original].

UNITED STATES OF AMERICA,—ss.

The President of the United States to the Honorable, the Judge of the District Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in the said United States District Court for the Western District of Washington, Northern Division, in the case of the United States of America, plaintiff, vs. P. G. Niven defendant, and in which the said P. G. Niven as such defendant is now the plaintiff in error herein, a manifest error hath happened, to the great damage of the said P. G. Niven, plaintiff in error, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do

command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at the city of San Francisco in the State of California on the 28th day of November next, in the said Circuit Court of Appeals to be then and there held, and that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice, of the Supreme Court of the United States, the 30th day of October, 1908.

[Seal] R. M. HOPKINS,

Clerk of the United States District Court for the Western District of Washington, Northern Division.

Allowed by:

C. H. HANFORD,

District Judge.

Service of the within and foregoing Writ of Error and receipt of a copy thereof is hereby admitted, this 30th day of October, 1908.

ELMER E. TODD,

United States Attorney.

By CHARLES T. HUTSON,

Assistant United States Attorney.

[Endorsed]: No. 3248. In the United States District Court, Western District of Washington, Northern Division. P. G. Niven, Plaintiff in Error, vs. United States of America, Defendant in Error. Writ of Error. Original. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 30, 1908. R. M. Hopkins, Clerk. A. N. Moore, Deputy. James M. Ashton for Pltff. in Error. Office No. 410 Fidelity Building, Tacoma, Washington, a place within the said District at which service of all subsequent papers, other than writs and process, may be made.

[Citation on Writ of Error (Original)].

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the United States of America and to the United States Attorney for the Western District of Washington, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, in the State of California, within thirty days from the date of this Writ, pursuant to the Writ of Error filed in the office of the Clerk of the United States District Court for the Western District of Washington, Northern Division, wherein P. G. Niven is plaintiff in error and the United States of America is defendant in error, to show cause, if any there be, why the judgment in the said Writ of Error mentioned should not be corrected, and why speedy justice should not be done to the party in that behalf.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States of America, this 30th day of October, 1908, and of the Independence of the United States the 133d.

[Seal] C. H. HANFORD,

United States District Judge for the Western District of Washington, Northern Division.

Attest: R. M. HOPKINS,

Clerk.

Due and lawful service of the within and foregoing citation, and receipt of the copy thereof, is hereby admitted this 30th day of October, A. D. 1908.

UNITED STATES OF AMERICA,

By ELMER E. TODD,

United States Attorney for the Western District of Washington, Appearing for and Representing the United States in the Writ of Error and case Mentioned in the Foregoing Citation.

By CHARLES T. HUTSON,

Asst. U. S. Atty.

[Endorsed]: No. 3248. In the United States District Court, Western District of Washington, Northern Division. P. G. Niven, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation. Original. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 30, 1908. R. M. Hopkins, Clerk. A. N. Moore, Deputy. James M. Ashton, for Pltff. in Error, Office No. 410 Fidelity Building, Tacoma, Washington, a place within the said District at which service of all sub-

sequent papers, other than writs and process, may be made.

[Endorsed]: No. 1668. United States Circuit Court of Appeals for the Ninth Circuit. P. G. Niven, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Filed November 27, 1908.

F. D. MONCKTON,

Clerk.

No. 1668

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

P. G. NIVEN,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF

FOR PLAINTIFF IN ERROR

JAMES M. ASHTON,
Attorney and Counsel for Plaintiff in Error.

The Bell Press, Printers, Tacoma

FILED
JAN 25 1909

No. 1668

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

P. G. NIVEN,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF

FOR PLAINTIFF IN ERROR

Plaintiff in Error is the master of the British S. S. "Wyneric." He arrived in Tacoma from Panama on December 26th, 1905, with his steamship, and having on board one William Hall, a sailor afflicted with consumption or having a tendency in that direction.

Hall, with other members of the crew, was at the time ill with malarial fever, and after an examination by the physician in charge of the Fannie Paddock Hos-

pital at Tacoma and by Dr. Schug, United States Marine Physician and Surgeon at Tacoma, Hall, with the other seamen, was placed in the said hospital.

On the next day the Immigration Inspector at Tacoma notified Plaintiff in Error to prevent the landing of the seamen, taking the position that they were aliens under Section Eighteen of the Act of Congress approved March 3, 1903. (Record, pp. 9 and 10, and Sec. 18 of Statute there quoted.)

Plaintiff in Error then requested that he be given permission to discharge the men, including Hall, as they were not able to fulfill their duties on the intended voyage of the steamer.

On December 30th, after another examination of all by Dr. Schug, held on the 29th, Plaintiff in Error was directed by the Immigration Service to return the seamen to the port from which they came.

Hall, at the time, with the other seamen, was in said hospital sick, unable to be removed, and on January 12th, 1906, Plaintiff in Error and the British Vice-Consul at Tacoma, with Drs. McCutcheon and Schug, again examined the seamen and determined that Hall, with other seamen, was unable to proceed to sea on account of his sickness.

The "Wyneric" was then loaded and ready for sea. (Record, p. 15.)

Plaintiff in Error, under the laws of the ship's flag, to-wit: the British Merchants' Shipping Act, and under the instructions of said Vice-Consul, discharged Hall as

a distressed British seaman, and left him in charge of said British Consul.

The steamship sailed on the following date, January 13th, 1906.

Hall's home, to which he would be returned in due course under the British law pertaining to seamen in his plight, was at South Shields, England.

January 25th, twelve days after Plaintiff in Error had sailed away with his steamship, the British Vice-Consul made an arrangement with the master of the British steamship "Craighall," whereby Hall was to be returned on the S. S. "Craighall" to South Shields, he having then recovered sufficiently to go on board as an ordinary seaman.

Hall refused to ship, and the Vice-Consul, not being entirely satisfied that his health was sufficiently good, he was allowed to remain in the hospital under treatment.

On January 20th, the Consul had received a notice from the Immigration Inspector to the effect that the master, Plaintiff in Error, had been served with notice of deportation and that instead of placing Hall aboard the "Wyneric," he had been brought before the Consul and discharged.

The Consul then informed the Immigration Service of his doings in the matter, and that the master of the "Craighall" had refused to take Hall on board unless he could work, and that he would get him on some vessel bound to his home as soon as his condition was improved, and the physician so certified. (Record, pp. 18 to 20.)

Thereafter, Hall again refused to ship on the British ship "Balmoral," bound from Tacoma to Hull, England. This was on February 14th, 1906. (Record, p. 21.)

The Vice-Consul then took the position that he could not cause Hall's arrest, as he was not a deserter, but a discharged seaman, and requested the Immigration Service to have the Inspector take Hall from the hospital and place him on board the "Balmoral." The Immigration Department informed the Vice-Consul that they had no authority to do so, and could not render him any assistance, whereupon the Vice-Consul stated his position in writing. (Record, p. 22.)

The Immigration Service then stated to the Consul, that if arrangements were made to place the "alien" on an outbound vessel licensed to carry passengers, that the Inspector at Tacoma would be instructed to escort him on board of said vessel, and that Hall must be considered as in the custody of and at the risk of the master of the vessel which brought him to the United States, or its owners, and it was their duty to remove him from the United States.

This was in a communication from the Commissioner-General of Immigration dated February 6th, 1906. (Record, pp. 24-25.)

This letter of the Commissioner states as follows: "This situation could be altered only by the escape of said Hall from the hospital, in which event it would become necessary to issue a warrant, because he would be then in the United States in violation of law, and not in the custody and under the control of the owners of the

vessel by which he was brought, or of any of such owners." The letter further indicates that the case was the subject of a letter from the Commissioner to the Secretary of State, dated February 6th, 1906. (Record, p. 25.)

On February 28th the British Consul refused to afford further relief to Hall, whereupon he left the hospital and disappeared. (Record, pp. 27-28.)

When Plaintiff in Error returned to Tacoma with his steamer in April, 1906, he was arrested and convicted of violating Section 18 of the Act referred to. (32 U. S. Stat. at Large, pp. 1217-1218).

ASSIGNMENT OF ERRORS.

The Plaintiff in Error then made the following Assignment of Errors:

FIRST.

United States District Court, for the Western District of Washington, Northern Division, erred in holding that the seaman, William Hall, mentioned in the information herein, was an alien within the meaning of that term as used in Sections Eighteen, Nineteen and Twenty, or either of said Sections as contained in the Act of Congress entitled, "An Act to Regulate the Immigration of Aliens into the United States," approved March 3rd, 1903.

SECOND.

That said United States District Court erred in holding that said William Hall was rightfully denied admission into the United States by the Immigration Officers of the United States.

THIRD.

The said District Court erred in holding and finding that the defendant herein, P. G. Niven, had violated Section Eighteen of said Act.

FOURTH.

The aforesaid District Court erred in holding that the defendant, P. G. Niven, had violated the said Act in any respect or to any extent.

FIFTH.

Error of the United States District Court for the Western District of Washington, Northern Division, in

finding the defendant guilty as charged in the information against him.

SIXTH.

Error of the said United States District Court in passing sentence upon the defendant to the effect that he pay the United States a fine of One Hundred Dollars and costs.

SEVENTH.

Error of the United States District Court for the Western District of Washington, Northern Division, in entering judgment against the defendant for the amount of said fine of One Hundred Dollars ($100.00) and costs, and that execution be issued therefor, which judgment was rendered and entered herein on the 26th day of October, 1908, and Plaintiff in Error here respectfully alleges that said judgment is contrary to law.

ARGUMENT.

The cases of *Taylor vs. United States* and *United States vs. MacDonald,* 207 U. S., p. 120, 52 L. Ed. 130, hold that an alien seaman coming into the United States in the regular performance of his duty as a sailor on board a foreign vessel is not an alien immigrant within and subject to the terms of the Act referred to.

The learned Judge of the Court below, while finding that Hall was discharged and left in the hospital in charge of the vice-consul of his country as a distressed seaman, nevertheless held that the plaintiff in error was not relieved from the obligation of detaining Hall and taking him away, and that plaintiff in error abandoned him *without providing for his removal,* and that by so doing the plaintiff in error intentionally violated Section Eighteen of the Act. (Record, p. 48.) Also that plaintiff in error manifested utter disregard of the obligations imposed upon him by law, and for that reason the learned Judge distinguishes this case from the Taylor case, above referred to. (Record, p. 49.)

It will be apparent from the facts set forth in the record that the plaintiff did absolutely nothing excepting what the laws governing his ship, in connection with his handling of his sick sailors, compelled him to do, and the record throughout shows a conscientious and sincere effort on the part of Captain Niven to comply with the requirements of the United States Immigration Service and at the same time to take the necessary steps whereby the seaman would be cared for and returned under the British law.

The facts which led to the complications whereby both the vice-consul and the officers of the immigration service neglected to arrest Hall all occurred when Captain Niven, the plaintiff in error, was far away from the scene of action, and he could not have been a party to any willful, intentional or culpable violation of the Act, assuming solely as argument that Hall was an alien within the Act.

Sufficient is apparent from the record to show that this case has created considerable interest through diplomatic channels and otherwise. If the vice-consul was derelict in his duty, plaintiff in error should not be punished therefor, as he acted in good faith at all times and in all things when he was personally present, and in connection with all matters of which he had personal control.

On the 6th of February, when the immigation officers knew of the situation, they were notified by their superior, the commissioner general, that a warrant could be issued for the arrest of Hall, should he seek to escape. Yet for twenty-two days thereafter, and until February 28th, 1906, when Hall had left the hospital entirely, the immigration officer wanted the vice-consul to take steps to arrest him or to place him in a position whereby he could be dealt with either under the immigration laws of the United States or under the British Merchants' Shipping Act.

Plaintiff in error was absent during all this time and was not even indirectly a party to such events; on the other hand, the record throughout shows he did his utmost to do what was right under the circumstances to comply with the laws of this land and with the laws of

his own land, and without in any way attempting to place one above the other, or to manifest other than good faith in every way.

The attention of the Court is respectfully called to the following cases:

(1). *United States vs. Hemet* (Dist. Court of Oregon; decided September 27th, 1907), 156 Fed. Rep., p. 285.

(2). The statute in question is a highly penal statute and is to be construed strictly:

Hackfeld & Co. Ltd. vs. U. S., 197 U. S. 442, s. c. 49 Law Ed. 826.

Moffit vs. U. S., 128 Fed 375 (C. C. A. 9th C.).

U. S. vs. Gay, 80 Fed. Rep. 254.

(3). The Act of 1903 is a re-enactment of the Act of 1891. The obligation upon the ship and master is considered, and "neglect to detain" is construed to mean some active negligence. Ships and masters are not insurers that the alien shall be deported. Nothing more is required than a faithful and careful effort to carry out the duty so imposed.

Hackfeld & Co. Ltd. vs. U. S., 197 U. S. 442, s. c. 49 Law Ed. 826.

(4). The immigration laws, in so far as they relate to punishments for their violation, are highly penal, and are to be strictly construed, and their provisions apply only to cases within their terms and spirit, construed as a whole. By this rule the Act of 1891 applies only to immigrants who come for the purpose of permanent residence, and the penalty imposed by Section Ten

on the master for "neglect to detain" or "to return" is limited to alien immigrants. A stowaway who signs ship's articles is not such immigrant.

Moffit vs. U. S., 128 Fed. 375 (C. C. A. 9th C.).

(5). Aliens composing the crews of vessels visiting United States seaports are in no sense immigrants and are not affected by immigration laws. With regard to them the immigration laws impose no duties or penalties upon agents or masters of vessels.

U. S. vs. Sandrey, 48 Fed. Rep. 550.

(6). The Inspector of Immigration had power to cause the arrest of Hall.

In re Lifieri, 52 Fed. Rep. 293.

(7). The immigration laws of the United States, like all other statutes, must be given a sensible construction having reference to their purpose; and, as so construed, they apply only to such aliens as enter or are brought here with the intention that they shall become residents here. They have no application to alien seamen who constitute the bona fide crew of a vessl trading in the ports of the United States, and who enter such ports in the discharge of the duties of their employment and without any intention of becoming residents.

U. S. ex rel. Anderson vs. Burke, 99 Fed. Rep. 895.

(8). Where a seaman on a British ship was detained in a hospital to which he had been sent for treatment by the master of his ship at the intervention of the British Consul, the fact that his discharge therefrom might raise a question of the liability of the ship's master for in; fraction of the immigration laws affords no ground for

his detention, and a writ of habeas corpus was granted, on condition that twenty-four hours' notice be given to the Commissioner of Immigration to enable him to take such steps as he might think best.

In re Carlsen's Petition, 130 Fed. Rep. 379.

In view of the authorities above cited and in view of the unusual facts in this case, showing clearly as they do that plaintiff in error was clearly devoid of any intent of wrongdoing, and particularly in view of the decisions of the Supreme Court in the Taylor and MacDonald cases, above cited, plaintiff in error respectfully submits that he has been wrongfully convicted and punished and respectfully requests that the judgment of the District Court of the United States for the Western District of Washington be reversed and that he be discharged and his bail exonerated.

All of which is respectfully submitted.

JAMES M. ASHTON,

Attorney and Counsel for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

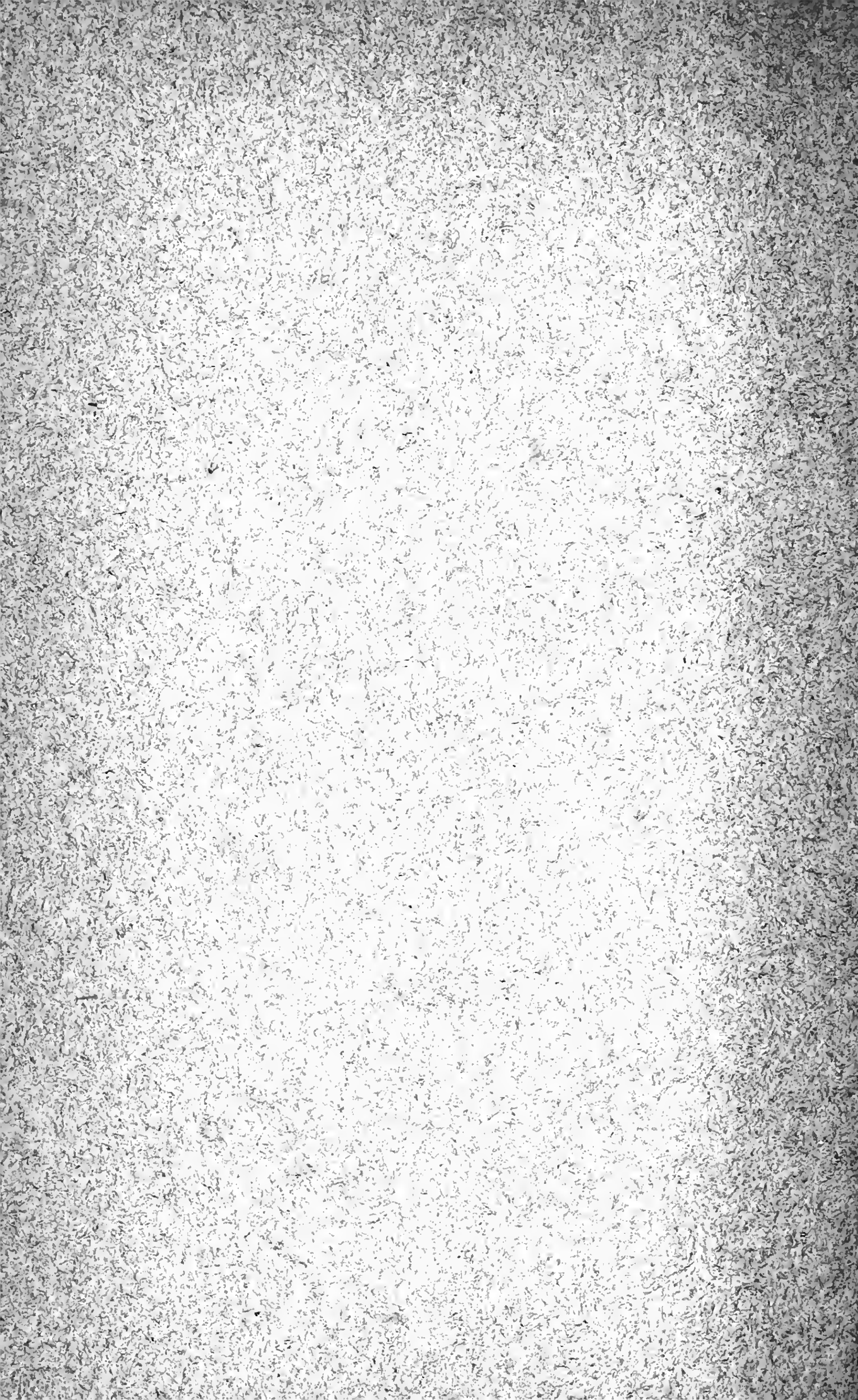
P. G. NIVEN, *Plaintiff in Error.* vs. THE UNITED STATES OF AMERICA, *Defendant in Error.*	No. 1668

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Defendant in Error

ELMER E. TODD,
United States Attorney,
CHARLES T. HUTSON,
Assistant United States Attorney.

The Ivy Press, Second and Cherry, Seattle



IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

P. G. NIVEN, *Plaintiff in Error.* vs. THE UNITED STATES OF AMERICA, *Defendant in Error.*	No. 1668

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Defendant in Error

ELMER E. TODD,
United States Attorney,
CHARLES T. HUTSON,
Assistant United States Attorney.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

P. G. NIVEN,
Plaintiff in Error.

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 1668

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Defendant in Error

STATEMENT OF THE CASE.

The facts in this case were stipulated by the parties hereto, said stipulation not being very lengthy. Counsel for plaintiff in error, however, in his brief did not fully cover them, and we will endeavor to state them in as few words as possible. The British steamship "Wyneric," of which plaintiff in error is master, arrived in Tacoma December 26th, 1905, from LaBoca, Panama, having on her articles as an ordinary seaman one William Hall. Hall, with fourteen other members of the crew of the "Wyneric" was ill

with malarial fever at the time of the arrival, and, after examination by physicians, was placed in the Fannie Paddock Hospital in Tacoma for treatment. (Record, 8-9.) On the next day, plaintiff in error, as such master, received notice from the United States Immigration Inspector in charge at Seattle, Washington, in accordance with Section 18 of the Act of March 3rd, 1903, notifying plaintiff in error to prevent the landing of certain aliens, to-wit: William Hall, William Holmes, G. W. Kelly and J. Young, until such time as their right to do so had been determined by the Immigration Officers. (Record, 10-11.) On December 28th, 1905, plaintiff in error requested permission of the Immigration Officers to discharge three of the said sailors above mentioned, viz: Kelly, Holmes and Hall. (Record, 11.) On the 29th of said December, the Immigration Officers made a proper examination of the said Holmes, Kelly and Hall, and on the 30th of said December notified the plaintiff in error that the said named persons had been duly excluded from admission into the United States, and notifying him to return them to the port from which they came (Record, 12-13), and further notifying him that said Hall was found to be of "consumptive tendency very marked affecting ability to earn a living." Thereafter said Holmes and Kelly,

at the request of plaintiff in error, were taken to the port of Port Townsend, and held there until the "Wyneric" departed from that port on her outward voyage.

Thereafter on January 12th, 1906, Hall with the others of the aforesaid sailors remaining at said Fannie Paddock Hospital were again examined and found by the examining physicians to be unable to proceed to sea on account of sickness. (Record, 15.) After said examination, and on said date, the said seamen, of whom Hall was one, were then and there discharged from the service of the steamship "Wyneric." On the next day, January 13th, plaintiff in error departed with his said ship from the port of Tacoma outward bound, leaving said seaman, Hall, at said hospital in Tacoma, Washington, as aforesaid.

On January 25th, 1906, the same examining physicians heretofore referred to, certified that Hall was able to ship as an ordinary seaman. (Record, 17.) Again on February 14th, 1906, the same physicians again certified that Hall was able to ship as an ordinary seaman, but Hall remained at the hospital in Tacoma aforesaid until February 28th, 1906, at which time he left the hospital and has not since been seen or heard of. (Record, 21.)

Plaintiff in error seeks to rest his actions in this matter on the British Merchant's Shipping Act, and that notwithstanding the notice received by him to deport Hall he was justified in discharging Hall before British Vice Consul Alexander at Tacoma, on January 12th. On January 19th, 1906 (Record, 18), the Immigration Officers in Seattle wrote said Alexander informing him that the Immigration Officers had been advised of the action of the plaintiff in error and of the Vice Consul, and that no arrangements had been made by either the plaintiff in error or the Vice Consul to deport Hall, and added:

"He has been regularly debarred by a special board of inquiry on certificate from a Marine Hospital Surgeon, and must be returned to the country from whence he came."

Thereafter it will be noticed that the plaintiff in error states that he tried to ship Hall on the S. S. "Craighall" as an ordinary seaman, but Hall refused to ship. (Record, 19.) Again on February 14th, 1906, plaintiff in error states that through the Vice Consul he tried to arrange to have Hall ship as an ordinary seaman on the British ship "Balmoral." Hall refused to ship as such ordinary seaman. On February 17th said Vice Consul was notified by the Immigration Officers that:

"The status of this alien, William Hall, is the same as that of an alien seaman debarred landing, and is ashore at the expense and risk of the vessel bringing him and it is not within the province of the Immigration Inspectors to compel this alien to ship as a seaman aboard an outgoing vessel against his will, nor to violate the navigation laws by placing him aboard a ship not licensed to carry passengers from the United States. If arrangements are made to place the alien on an outbound vessel licensed to carry passengers, *the Inspectors at Tacoma will be instructed to escort said alien aboard said vessel.*" (Record, 23-24.)

At the time of sending the aforesaid notice, a copy of a letter from Commissioner General of Immigration at Washington, D. C., under date of February 6th, 1906, was enclosed for the information of said Vice Consul. Counsel for plaintiff in error has quoted only a portion of said letter (Record, 24-25), and not that portion wherein the Commissioner states:

"He therefore remains in the custody and at the risk of the master of the vessel by which he was brought until said master, or the owners of the vessel, remove the said Hall from the United States in accordance with the findings of the board of special inquiry."

The said letter, however, states that it was not a proper case for the Immigration Office to issue a warrant for his arrest and deportation. That that situation might come about in the event of the escape of

Hall from the hospital. It was but a few days, however, after the receipt of the copy of the said letter from the Commissioner General that the Vice Consul withdrew any further support which he had been giving Hall at the hospital, and said Hall immediately left the said hospital. In a letter from said Vice Consul, February 28th (Record, 26) he states:

> "I shall cease to afford relief for seaman Hall, who now forfeits a claim to be sent home and asks that he be discharged from the Memorial Hospital."

He had previously notified the hospital to that effect. (Record 27.) It would appear from the statement filed by said Vice Consul (Record, 28-29) that Hall's sustenance in said hospital was in reality paid by himself; that said Vice Consul received wages then due Hall and applied them, so far as needed, on the expenses incurred by Hall at said hospital.

ARGUMENT.

In re Taylor v. United States, and the *United States v. McDonald*, 207 U. S. 124 (the latest U. S. Supreme Court decision bearing upon this case), this portion of the Immigration Act aforesaid was considered and construed. The Supreme Court therein decided that Section 18 of said Act does not apply to the ordinary case of a sailor deserting while on shore

leave, but did not state that the section did not apply to alien seamen in any event and under any circumstances. Instead, it particularly states at page 127 thereof as follows:

> "Of course it is possible for a master unlawfully to permit an alien to land, even if the alien is a sailor."

Hall was admittedly an alien seaman, and this case is not that of alien seaman deserting while on shore leave, so the Act applies.

The same degree of caution would then be necessary to relieve plaintiff in error for violation of said Act as charged, as would be necessary where the unlawful landing of an alien immigrant was concerned. The Supreme Court in the above mentioned case at page 124 says:

> "We assume for purposes of decision that one who makes it possible for an alien to land, by omitting due precautions to prevent it, permits him to land within the meaning of the penal clause in section 18."

In this case plaintiff in error, after being notified by the proper Immigration Officers to prevent the landing of Hall for the reason that he was found to have "consumptive tendency very marked, affecting his ability to earn a living," and to belong to the class of aliens excluded from the United States by the

terms of the Act of Congress aforesaid, requested permission to discharge Hall from the service of the vessel, on the ground that he was not in a condition to fulfill the duties on the intended voyage. An examination was then had of said Hall, and plaintiff in error was then notified (Record, 12) that Hall for the aforesaid reason had been duly excluded from admission into the United States, and that plaintiff in error should return Hall to the port whence he came. Plaintiff in error then deliberately discharged said Hall as such seaman, and left him in said hospital in Tacoma. The "Wyneric" proceeded next day on her voyage without Hall, and without any provision having been made to return Hall to the country whence he came, in accordance with the orders of the Immigration Officers. Plaintiff in error thus, not only made it possible for Hall to land in the United States by omitting due precautions to prevent it, but himself did, or caused to be done all of the acts connected with and incident to the landing of Hall.

The facts plainly bear out the Honorable District Judge when he said (Record, 48):

"It is the opinion of the court that as Hall was afflicted with a contagious disease at the time of his arrival in this country, he belonged to the class of aliens excluded from entering the United States by the terms of said Act of Congress, that he was right-

fully denied admission by the immigration officers, that his admission to the hospital for treatment did not change his status as an alien seaman in the service of the vessel. That is to say, he was not admitted to this country by permission of the immigration officers, so as to relieve the defendant of the obligation to detain him and take him away, and that by abandoning him without providing for his removal, the defendant intentionally violated Section 18 of said Act of Congress," and also (Record 49):

"The manifest intention of the defendant to rid his vessel of the burden of a diseased and infirm seaman and his utter disregard of the obligations imposed by law, was culpable, and distinguishes this case from the Taylor case."

Therein undoubtedly meaning that there is a vast difference between the facts in this case and that of an ordinary alien seaman deserting while on short leave.

Plaintiff in error seeks to justify himself by stating that all he did in this matter was done in accordance with the British Merchant's Shipping Act, and upon the advice of the British Vice Consul at Tacoma. We contend that the British Merchant's Shipping Act referred to, and the particular acts of the British Vice Consul are in no way relevant to the determination of this case, and such a reservation was saved to the United States in the stipulation entered into herein (Record, p. 29). The immigration laws of the United States prohibit the landing of an alien such as Hall under the circumstances and conditions in which

plaintiff in error sought to land him, and neither the British Merchant's Shipping Act, nor the advice of the British Vice Consul in Tacoma can relieve plaintiff in error for a willful violation of the United States laws.

Wildenhus' Case, 120 U. S. Reports, 11.

"It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement; for, as was said by Chief Justice Marshall in *The Exchange*, 7 Cranch, 116, 144, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction and the government to degradation if such * * * merchants did not owe temporary and local allegience and were not amenable to the jurisdiction of the country."

Upon thorough investigation, we are unable to find any treaty arrangements stipulating to the contrary, and upon careful examination of the brief of counsel for plaintiff in error, find that while he sets out the reasons why plaintiff in error did the things he is charged with doing, yet nowhere does he cite any authority to sustain the position taken by him.

On page 11 of the brief of counsel for plaintiff in error, it is stated that the immigration officers neglected to obtain a warrant for the arrest of Hall dur-

ing the time he was in the hospital at Tacoma, and that when he did escape, the fault was that of the immigration officers, and not of plaintiff in error. This position is not tenable for the reason that Hall was in the United States at the risk of the plaintiff in error, and that while at said hospital was being cared for under the directions of plaintiff in error, and it was the duty of plaintiff in error either to see to it personally, or arrange to have someone deport Hall to the country whence he came; and the mere fact that Hall would not ship as an ordinary seaman does not relieve plaintiff in error from liability.

We have examined all of the cases cited in the brief of counsel for plaintiff in error, and find that they all antedate the cases of *Taylor v. United States,* and *United States v. McDonald,* 207 U. S. 120, above referred to. Several of the citations cover an entirely different statement of facts, and are not even analagous, while others refer only to cases wherein the law is more fully covered by the said Taylor and McDonald cases, and we do not consider it necessary to consider them in this brief. We submit that nothing appears from the facts in the case, nor from the brief of counsel for plaintiff in error, to support the prayer of plaintiff in error that the judgment of the District

Court of the United States for the Western District of Washington be reversed, and we respectfully submit that it should be affirmed.

Respectfully submitted,

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